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SUPREME COURT, U. S.

APPENDIX

FILED
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1264

MAYOR OF THE CITY OF PHILADELPHIA, *et al.*,
Petitioners

v.

EDUCATIONAL EQUALITY LEAGUE, *et al.*,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petition for Certiorari filed March 16, 1973
Certiorari granted May 7, 1973

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Order Amending Opinion of the United States Court of Appeals for the Third Circuit, dated February 21, 1973, incorporated herein by reference, appears in the Petition for Writ of Certiorari at Page	52

RELEVANT DOCKET ENTRIES

August 6, 1971	Complaint filed.
Eo. Die.	Plffs' motion for preliminary injunction, filed.
August 10, 1971	Defts' motion to dismiss and notice of motion, filed.
August 17, 1971	Plffs' request for admission under Rule 36, filed.
Eo. Die.	Plffs' motion for declaration of class action, filed.
August 18, 1971	Defts' amended motion to dismiss, filed.
August 23, 1971	Ordered that defts' respond to plffs' Request for Admissions by delivering said response to the office of plffs' counsel no later than 5 P.M. 8/24/71, filed.
August 25, 1971	Non-Jury Trial begins. Motion to dismiss — Denied. Trial witnesses sworn. C.A.V.
August 27, 1971	Defts' answers to request for admissions, filed.
September 7, 1971	Non-jury trial reconvenes. Trial witnesses sworn.
September 8, 1971	Defts' supplemental answers to request for admissions, filed.
September 10, 1971	Plffs' motion to produce document or strike testimony, filed.
September 15, 1971	Defts' answer to motion to produce document or strike testimony, filed.
September 28, 1971	Plffs' amended motion to compel production of document, filed.

September 29, 1971	Defts' answer to amended motion to compel production of document, filed.
October 1, 1971	Order that deft produce one copy of document entitled "City Employees Study" to plff and one copy to Court, etc., filed (10/4/71) entered and copies mailed.
October 8, 1971	Plffs' motion to compel compliance with Order of the Court dated 10/1/71, filed.
October 13, 1971	Answer of defts, filed.
October 28, 1971	Order dated 10/27/71 that plff return to deft all copies of report (City Employee's Study) obtained pursuant to Court's prior order in this case, filed. 10/29/71 entered and copies mailed.
November 8, 1971	Findings of fact, conclusions of law, Broderick, J. and Order dated 11/8/71, that this complaint is dismissed with prejudice, filed. 11/8/71 notice mailed—11/9/71 entered.
November 9, 1971	Supplemental record transmitted to U.S. Court of Appeals.
November 10, 1971	Notice of appeal of plffs, filed. (11/11/71 entered and copy mailed to U.S. Court of Appeals and Levy Anderson, Esq. and John Mattioni, Esq.)
November 17, 1971	Copy of Notice of Appeal rec'd November 12, 1971, filed.
December 5, 1972	Argued. Coram: Van Dusen, Gibbons and Hunter.

January 11, 1973	Opinion of the Court (Van Dusen, Gibbons and Hunter), filed.
Eo. Die.	Judgment vacating the judgment of the District Court filed November 8, 1971, except as to the Educational Nominating Panel, and remanding the cause to the District Court for further proceedings consistent with the opinion of this Court, filed.
January 23, 1973	Petition for Rehearing, filed. (25 copies)
January 26, 1973	Petition for Rehearing and Petition for Rehearing en banc, filed. (25 copies)
February 21, 1973	Order Amending Opinion (Van Dusen, Gibbons and Hunter), filed.
Eo. Die.	Order (Van Dusen, Aldisert, Adams, Gibbons, Rosenn and Hunter, C. J.) denying the petition for rehearing filed by appellees, filed.
March 1, 1973	Motion by appellees for stay of mandate pending certiorari filed. (4 copies) Affidavit of service attached.
Eo. Die.	Answer by appellants to motion for stay of mandate, filed. (4 copies) Affidavit of service attached.
March 2, 1973	Order (Van Dusen, Circuit Judge) staying the issuance of the mandate until Supreme Court of the U.S. contemplated by the 3d sentence of Rule 41(b) of F.R.A.P. is filed with the clerk of this Court on or before March 17, 1973, filed.

March 20, 1973	Notice of filing of petition for writ of certiorari on March 16, 1973 rec'd from Clerk of Supreme Court, filed. (S.C. No. 72-1264)
May 14, 1973	Certified copy of order dated May 7, 1973 rec'd from Clerk of S.C. granting the petition for writ of certiorari, filed. (S.C. No. 72-1246)

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 71-1938

EDUCATIONAL EQUALITY LEAGUE, et al.,
Plaintiffs

v.

HONORABLE JAMES H. J. TATE, et al.,
Defendants

REQUEST FOR ADMISSION UNDER RULE 36

Plaintiffs hereby request defendants within three (3) days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the following are all employees of the City of Philadelphia, that they hold the position indicated, that they are all exempt from civil service under Section 7-301 of the City Charter, and that they are of the race indicated:

E	Fred T. Corleto	white	Managing Director
E	Romanus J. Buckley	white	Finance Director
E	Levy Anderson	white	City Solicitor
E	Anthony P. Zecca	white	Deputy to the Mayor
E	Tina V. Weintraub	white	Executive Director, PGH

E	Joseph J. Gaffigan	white	Deputy Managing Director
E	Gordon Cavanaugh	white	Deputy Managing Director
E	Thomas A. Mills	white	Deputy Managing Director
CS	Saverio F. Brunetti	white	Municipal Dispensary Retired 3-4-71
E	John M. McNally	white	Deputy City Solicitor
E	George J. Ivins	white	Deputy City Solicitor
E	John A. Mattioni	white	Deputy City Solicitor
E	Otto R. Winter	white	Commissioner, Procurement
CS	Robert Chantigian	white	Deputy, Procurement
E	James L. Ferguson	white	Deputy Director of Finance
E	Irvin R. Davis	white	Deputy Director of Finance
E	John J. Donnelly	white	Deputy Director of Finance
CS	Henry D. LeCerff	white	Deputy Director of Finance
CS	Joseph W. Hickey	white	Deputy Director of Finance
CS	Bernard B. Eiss	white	Deputy Director of Finance
E	Thomas W. Rogers	white	Revenue Commissioner
E	S. Harry Galfand	white	City Representative
E	David G. Davis	white	Deputy Representative
E	Irvin J. Good	white	Deputy Representative Resigned 1-1-71
E	Richard L. Olanoff	white	Deputy Representative
CS	William T. Burns	white	Deputy Representative
CS	Gordon Jacobson	white	Deputy Director, Division of Aviation
E	Joseph F. O'Neill	white	Commissioner of Police

E	Robert J. Selfridge	white	Deputy Commissioner
E	Morton B. Solomon	white	Deputy Commissioner
E	Randolph E. Wise	white	Commissioner of Public Welfare
E	Manuel Kaufman	white	Deputy Commissioner
E	Edward J. Hendrick	white	Superintendent, Philadelphia Prisons
E	William A. Costello	white	Commissioner, Department of Public Property
CS	Edson L. Tennyson	white	Deputy Commissioner
CS	Paul J. Marzullo	white	Deputy Commissioner
E	James J. McCarey	white	Fire Commissioner
E	William J. Eckles	white	Deputy Commissioner
E	Joseph B. McKenna	white	Deputy Commissioner
E	Samuel S. Baxter	white	Water Commissioner
E	Charles E. Vickerman	white	Deputy Commissioner
CS	Carmen F. Guarino	white	Deputy Commissioner
E	Leo Goldstein	white	Streets Commissioner
E	Stuart W. Adams	black	Deputy Commissioner
E	John M. Scruggs	white	Deputy Commissioner
CS	James W. McPhillips	white	Chief Engineer
E	Clarence A. Dockens	black	Commissioner, Licenses and Inspections
E	Robert R. Taylor	white	Deputy Commissioner
E	Paul L. McSorley	white	Commissioner of Records
E	Robert W. Crawford	white	Commissioner of Recreation
E	Norman R. Ingraham	white	Commissioner of Public Health
E	Walter J. Lear	white	Deputy Commissioner
CS	Lewis D. Polk	white	Deputy Commissioner
CS	Carl C. Janowsky	white	Division Director
CS	Alfred S. Bogucki	white	Division Director
CS	David A. Soricelli	white	Division Director

CS	Arthur Wallach	white	Division Director
CS	John L. Clay	white	Division Director Resigned 8-10-71
CS	Kristine S. Knisely	white	Division Director
CS	Louis P. Matucci	white	Division Director
CS	Leon Soffer	white	Deputy Commissioner, Mental Health
CS	Marvin E. Aronson	white	Medical Examiner
CS	Edward Wilson	white	Assistant Commissioner, Air Management Service
E	Foster B. Roser	white	Director of Personnel
E	Lewis S. Taylor	white	Deputy Director
E	Melvin Hardy	black	Executive Director, Phila. Anti-Poverty Action Commission
E	Goldie Watson	black	Director, Model Cities
E	William Will	white	Deputy Director
E	Elton W. Barclay	white	PGH Retired 6-30-71
E	Daniel A. Hall	black	PGH
CS	Ernest E. Zeger	white	PGH
E	Alfred C. LaBoccetta	white	PGH

2. That other than those listed above there are no employees of the City of Philadelphia (other than those appointed by other elected officials, including the Court of Common Pleas), who are exempt from civil services under Section 7-301 of the City Charter, and whose salaries are in excess of $20,000 per year. Denied

3. That the following are all staff members of Boards, Authorities, or Commissions (as indicated) in the City of Philadelphia appointed by defendant Tate, and that they are of the race indicated:

E	Harry Ferleger	white	Civic Center
E	Harold H. Salkind	white	Civil Defense

E	Clarence Farmer	black	Human Relations
	Francis J. Myers	white	Redevelopment Authority
	Walter D'Alessio	white	Redevelopment Authority
E	R. Damon Childs	white	City Planning Commission

4. That the above are the only staff members of the Boards, Authorities, or Commissions appointed by defendant Tate whose salaries are in excess of $20,000 per year.

5. That the following are all of the Boards, Authorities, or Commissions appointed by defendant Tate, that they are comprised of the number of members indicated, and that they have the number of black members indicated:

Commission on Higher Education	16 members (1 black)
Board of the Civic Center	11 members (1 black)
Commission on Human Relations	9 members (5 blacks)
City Planning Commission	8 members (1 black)
Art Commission	10 members (0 black)
Philadelphia Historical Commission	10 members (0 black)
Redevelopment Authority	5 members (2 blacks)
Mental Health & Mental Retardation Advisory Board	8 members (1 black)
Board of Health	8 members (0 black)
Board of Ethics	5 members (1 black)
Board of Labor Standards	7 members (0 black)
Gas Commission	5 members (1 black)
Plumbing Advisory Board	5 members (0 black)
Recreation Coordination Board	8 members (2 blacks)
Air Pollution Control Board	9 members (0 black)
Board of Trustees, PGH	7 members (1 black)
Child Welfare Advisory Board	15 members (4 blacks)
Board of Trustees, Riverview	7 members (1 black)

Board of Trustees, Philadelphia Prisons	6 members (0 black)
Civil Service Commission	4 members (1 black)
Fair Housing Commission	5 members (1 black)
Parking Authority	4 members (0 black)
Board of Zoning Appeals	5 members (1 black)
Board of Licenses & Inspection Review	6 members (1 black)
Veterans Advisory Commission	7 members (1 black)
Tax Review Board	5 members (1 black)
Board of Trustees of American Flag House and Betsy Ross Memorial	8 members (0 black)
Board of Building Standards	5 members (1 black)
Sinking Fund Commission	3 members (0 black)
Electrical Code Advisory Board	7 members (0 black)
Commission on Services to the Aging	27 members (7 blacks)
Philadelphia Housing Authority	5 members (2 appointed by Mayor; of his appointments, 1 is black)

6. That the 1970 census shows the Philadelphia population to be 1,948,609, of whom 653,791 are black.

7. That defendant Tate, upon naming the present Educational Nominating Panel, designated Anthony Cortigene as Chairman.

EDWIN D. WOLF
Attorney for Plaintiffs

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

(TITLE OMITTED IN PRINTING)

ANSWER AND OBJECTIONS TO REQUEST FOR ADMISSIONS

Defendants, by their counsel, hereby answer and object to Plaintiffs' Request for Admissions as follows:

1 to 5 inclusive. These requests are objected to by defendants on the grounds that they are erroneous, misleading and, in any event, are not relevant and cannot lead to the ascertainment of relevant evidence for use at the trial.

6. It is admitted that the 1970 census shows the population of the City of Philadelphia as stated in this request. The accuracy of the 1970 census for the City of Philadelphia is specifically denied.

7. Denied.

JOHN MATTIONI
Deputy to the City Solicitor
LEVY ANDERSON
City Solicitor

*Note: Affidavit omitted in printing.

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

(TITLE OMITTED IN PRINTING)

ANSWERS TO REQUEST FOR ADMISSIONS

1. Admitted that all of the listed persons are employees of the City of Philadelphia in the capacities stated except those named below. It is denied that all of the listed personnel "are all exempt from civil service." It is admitted that apparently the persons identified as black are so. Defendants can neither admit nor deny other racial denominations although they are probably substantially correct. In the hiring and maintenance of personnel records, the City of Philadelphia does not keep, maintain or require employees to designate race or national origin.

The list of names submitted is in error in that the following persons listed are not employees of the City at this time:

Saverio F. Brunetti
Irvin J. Good
John L. Clay
Elton W. Barclay

Tina V. Weintraub is no longer Deputy Managing Director but is now Executive Director of Philadelphia General Hospital.

2. Denied. Furthermore, of those listed, at least 23 are or were Civil Service employees (2 of those named who are no longer City employees were Civil Service).

3. Admitted.

4. Denied.

5. Denied in part and admitted in part. By way of further answer, you are advised that there are in addition to the boards and commissions named, at least eight other boards or commissions existing in the City of Philadelphia. With respect to the membership and composition of the boards and commissions named, they are admitted except as follows:

Redevelopment Authority—5 members (1 black)
Recreation Coordination Board—10 members (2 black)
Board of Trustees—Phila. Prisons—6 members (1 black)
Civil Service Commission—three members (1 black)
Board of Building Standards—5 members (2 black)

The various appointments, whether by the Mayor or otherwise, comprising the commissions and boards of the City of Philadelphia, consist in fact of many social, ethnic, racial and religious origins and all such appointments are made without regard to race.

6 and 7. Defendant incorporates by reference the answers to these two requests previously made.

JOHN MATTIONI
Deputy to the City Solicitor
LEVY ANDERSON
City Solicitor

*Note: Affidavit omitted in printing.

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

SUPPLEMENTAL ANSWERS TO REQUEST FOR ADMISSIONS

2 and 4. As of August 22, 1971, the following were all non-Civil Service employees whose salaries were in excess of $20,000.00. Only those names listed, following James H. J. Tate, and up to and including L. Taylor, were appointed by the Mayor. These appointees included staff members of Boards, Authorities and Commissions whose salaries are in excess of $20,000.00 per year:

Paul D'Ortona—Council
James H. J. Tate—Mayor

APPOINTED BY THE MAYOR

Anthony P. Zecca—Mayor's Office
Donald W. Kramer—Mayor's Office
Melvin L. Hardy—Mayor's Office (Black)
Harold H. Salkind—Office of Civil Defense
William H. Will—Development Coordinator
Goldie E. Watson—Development Coordinator (Black)
Joseph J. Gaffigan—Managing Director's Office
Thomas A. Mills—Managing Director's Office
Fred T. Corleto—Managing Director
Gordon Cavanaugh—Managing Director's Office
Joseph F. O'Neill—Commissioner, Police Department
Robert Selfridge—Police
Morton Solomon—Police
Leo Goldstein—Streets Commissioner
John M. Scruggs—Streets

William J. Eckles, Jr.—Fire
James J. McCarey—Fire
Joseph B. McKenna—Fire
Norman R. Ingraham—Public Health
Walter J. Lear—Public Health
Daniel A. Hall—Public Health (Black)
Tina V. Weintraub—Phila. General Hospital
Robert W. Crawford—Recreation
William A. Costello, Commissioner—Public Property
Randolph E. Wise—Public Welfare
Manuel Kaufman—Public Welfare
Edward J. Hendrick—Philadelphia Prisons
Clarence A. Dockens—Licenses & Inspections (Black)
Robert Taylor—Licenses & Inspections
Samuel S. Baxter—Commissioner—Water Department
Charles E. Vickerman—Water Department
Paul L. McSorley—Records
Romanus J. Buckley—Finance Director
John J. Donnelly—Finance
Irvin R. Davis—Finance
James L. Ferguson—Finance
Otto R. Winter, Commissioner—Procurement Dept.
Richard L. Olanoff—City Representative
David G. Davis—City Representative
S. Harry Galfand—City Representative
Lillian Berg—Commerce
Harry Ferleger—Phila. Civic Center
Karl I. Schofield—Law Department
Levy Anderson—City Solicitor—Law Department
Harry Wolov—Law Department
Albert J. Persichetti—Law Department
James L. Pié—Law Department
Theodore H. Lunine—Law Department
John M. McNally, Jr.—Law Department
George J. Ivins—Law Department
John Mattioni—Law Department

R. Damon Childs—City Planning Commission
Keith Doms—Phila. Free Library
Clarence Farmer—Commission on Human Relations (Black)
Foster B. Roser—Personnel Director
L. Taylor—Personnel

NOT APPOINTED BY THE MAYOR

Walter P. Harris—Auditing (Black)
Gilbert Stein—Auditing
Tom Gola—City Controller
Erwin Lodge—Clerk of Quarter Sessions Court
William A. King, Jr.—Register of Wills
Martin Vinikoor—District Attorney's Office
William H. Wolf, Jr.—District Attorney's Office
Richard A. Sprague—District Attorney's Office
Joseph F. Dougherty—District Attorney's Office
Arlen Specter—District Attorney
Delores Wilson—District Attorney's Office (Black)
Victor J. DiNubile—District Attorney's Office
Charles W. Sweeney, Jr.
William J. Stevens, Jr.
Edmund L. Levine
Eugene V. Alessandroni
Michael J. Rotko
James D. Crawford
Louis P. Mitrano
Wilhelm F. Knauer, Jr.
Walter W. Cohen
Paul R. Michel
Charles A. Haddad
James J. Fitzgerald
Edward G. Rendell
Robert E. Gabriel
Martin H. Belsky
Ivan M. Czap

Barnett S. Lotstein
Julian B. Brereton (Black)
Lynne M. Abraham
David Richman
Taras Wochok
Arthur R. Makadon
Esther R. Sylvester
Melvin M. Dildine
T. Michael Mather
Milton M. Stein
William M. Lennox—Sheriff
Maurice S. Osser—City Commissioner
Louis Menna—City Commissioner's Office
Francis B. Patterson—City Commissioner's Office
Joseph Matusow—Court of Common Pleas
Leonard Rosengarten—Court of Common Pleas
Nicholas G. Frignito
Thomas F. Carmody
Edward J. Blake
Americo V. Cortese—Prothonotary
Larry P. Polansky
Calvin T. Wilson (Black)
Fred H. Downs, Jr.
Stanley J. Bassett

5. Following are the names, total membership, number of members appointed by the Mayor and number of Black persons appointed by the Mayor of all the Boards, Authorities or Commissions of the City of Philadelphia:

Name	*Total Membership*	*Members Appointed By Mayor*	*Black Persons*
Air Pollution Control Board	7	7	0

Name	*Total Membership*	*Members Appointed By Mayor*	*Black Persons*
American Flag House and Betsy Ross Memorial Trustees	8	7	0
Art Commission	9	8	0
Barbers' Advisory Board	14	14	1
Board of Building Standards	5	4	1
Board of Education	9	9	2
Board of Ethics	5	5	1
Board of Health	7	6	0
Board of Labor Standards	5	5	0
Board of License and Inspection Review	6	6	1
Board of Pensions and Retirement	9	0	8
Board of Safety and Fire Prevention	20	4	0
Camp William Penn Board of Trustees	8	7	1
Child Welfare Advisory Board	15	15	3
City Planning Commission	9	6	1

Name	*Total Membership*	*Members Appointed By Mayor*	*Black Persons*
Civic Center Board of Directors	11	7	1
Civil Service Commission	3	3	1
Civil Service Commission Nominating Panel	7	0	0
Commission on Higher Education	16	15	1
Commission on Human Relations	9	9	5
Community College Nominating Panel	16	0	0
Community College Board of Trustees	15	15	1
Community Nursing Service	14	6	1
Educational Nominating Panel	13	13	2
Electrical Code Advisory Board	7		0
Fairmount Park Commission	16	0	0
Free Library of Phila., Board of Trustees	21	8	0
Gas Commission	5	2	0

Name	*Total Membership*	*Members Appointed By Mayor*	*Black Persons*
Hartranft Community Corporation	28	1	0
Independence National Historical Park Advisory Commission	11	3	0
Mayor's Committee on Municipal Hospital Services	22	22	3
Mayor's Scholarship Committee	8	8	0
Mayor's Traffic Safety Advisory Committee	23	23	0
Mental Health and Mental Retardation Advisory Board	7	7	1
Navigation Commission for the Delaware River	11	3	0
Passenger Service Improvement Corporation of Philadelphia	15	11	0
Philadelphia Anti-Poverty Act Commission	32	3	1
Philadelphia Authority for Industrial Development	7	7	0

Name	*Total Membership*	*Members Appointed By Mayor*	*Black Persons*
Philadelphia Commission on Services to the Aging	27	22	7
Philadelphia Fair Housing Commission	5	5	1
Philadelphia General Hospital Charitable Foundation	14	13	1
Philadelphia General Hospital Board of Trustees	7	6	1
Philadelphia Historical Commission	7	4	0
Philadelphia Housing Authority	5	2	1
Philadelphia Housing Development Corporation	35	0	0
Philadelphia Industrial Development Corporation	30	15 (with Chamber of Commerce)	1
Philadelphia Parking Authority	5	5	0
Philadelphia Port Corp.	33	0	0

Name	*Total Membership*	*Members Appointed By Mayor*	*Black Persons*
Philadelphia Redevelopment Authority	5	5	2
Plumbing Advisory Board	5	5	0
Prison Board of Trustees	7	6	1
Recreation Coordination Board	10	3	2
Riverview Board of Trustees	7	6	1
Service Standards Committee (for SEPTA)	5	1	0
Sinking Fund Commission	3	1	0
Southeastern Pennsylvania Transportation Authority	11	2	0
Tax Review Board	5	5	1
Technical Advisory Committee on Zoning	10	7	1
Tinicum Wildlife Preserve Advisory Board	6	6	0
Tri-Institutional Facilities Corp.	13	3	0

Name	*Total Member-ship*	*Members Appointed By Mayor*	*Black Persons*
Veterans' Advisory Commission	7	7 (with President of City Council)	1
Zoning Board of Adjustment	6	5	0

*Note: Affidavit omitted in printing.

Excerpts of Plaintiffs'
Final Pre-Trial Order

* * *

Part III—Facts

A. *Uncontested Facts*

1. The present Board of Education for the School District of Philadelphia is comprised of seven (7) white members and two (2) black members.

2. The dates in Paragraphs 20 and 25(d) of the Complaint are accepted as accurate.

3. The following Tables accurately list appointments to the Educational Nominating Panel for the years 1965, 1967, 1969 and 1971. The members are listed categorically as defined in Section 12-206(b)(c) of the Educational Supplement by name, organization or profession, and race.

EDUCATIONAL NOMINATING PANELS

Sec. 12-206(b)(1)

1965	Edward F. Toohey	Pres., Philadelphia Council AFL-CIO	White
1967	Edward F. Toohey	Pres., Philadelphia Council AFL-CIO	White
1969	Edward F. Toohey	Pres., Philadelphia Council AFL-CIO	White

1971	Edward F. Toohey	Pres., Philadelphia Council AFL-CIO	White

Sec. 12-206(b)(2)

1965	Gustav G. Amsterdam	Vice Pres., Philadelphia Chamber of Commerce	White
1967	Gustav G. Amsterdam	Vice Pres., Philadelphia Chamber of Commerce	White
1969	John P. Bracken	Pres., Philadelphia Chamber of Commerce	White
1971	Charles Tyson	Pres., Penn Mutual Insurance Company	White

Sec. 12-206(b)(3)

1965	Mrs. Beatrice Marks	Pres., Philadelphia Home and School Council	White
1967	Mrs. David Ewing	Pres., Philadelphia Home and School Council	White
1969	Mrs. Bernard Featherman	Pres., Philadelphia Home and School Council	White
1971	Mrs. A. Sherwood Platt	Pres., Philadelphia Home and School Council	White

Sec. 12-206(b)(4)

1965	Mrs. Marjorie Duckrey	Pres., Citizens' Com. on Public Education in Philadelphia	Black
1967	Mrs. Marjorie Duckrey	Pres., Citizens' Com. on Public Education in Philadelphia	Black
1969	Raymond K. Denworth	Pres., Citizens' Com. on Public Education in Philadelphia	White
1971	Mrs. Marjorie Duckrey	Pres., Citizens' Com. on Public Education in Philadelphia	Black

Sec. 12-206(b)(5)

1965	Leon Raider	Pres., Federations of Community Councils	White
1967	Charles Borkin	Pres., Federations of Community Councils	White
1969	Mrs. Mary Anderson	Member, Citywide Recreation & Playground Adv. Council	White
1971	Mrs. Mary Anderson	Member, Citywide Recreation & Playground Adv. Council	White

Sec. 12-206(b)(6)

1965	Walter A. Gay	Pres., Urban League	Black
1967	William S. Rawls	Pres., Urban League	White
1969	Joseph P. McLaughlin	Member, National Conf. of Christians & Jews	White
1971	Freeman Hankins	State Senator	Black

Sec. 12-206(b)(7)

1965	Mrs. H. Robert Cathcart	Pres., League of Women Voters	White
1967	Mrs. H. Robert Cathcart	Pres., League of Women Voters	White
1969	Lennox Moak	President, Pennsylvania Economy League	White
1971	Lennox Moak	President, Pennsylvania Economy League	White

Sec. 12-206(b)(8)

1965	Dr. Gaylord P. Harnwell	Pres., University of Pennsylvania	White
1967	Dr. Gaylord P. Harnwell	Pres., University of Pennsylvania	White
1969	Dr. Paul Anderson	Pres., Temple University	White
1971	Very Rev. Terrence Toland	Pres., St. Joseph's College	White

Sec. 12-206(b)(9)

1965	T. H. Husted, Jr., Esq.	Vice Pres., Philadelphia Housing Association	White
1967	William J. C. Hughson	Pres., Philadelphia Housing Association	White
1969	Frederick L. Ballard, Esq.	Member, Board of Directors, Health & Welfare Council	White
1971	Richard Herman	Realtor	White

Sec. 12-206(c) At-large Appointees

1965	Bro. Daniel Bernian	Pres., LaSalle College	White
	G. Fred DiBona, Esq.	Attorney	White
	William C. Willis	Vice Pres., Temple University	White
	Rev. Henry Nichols	Religious & Civic Leader	Black
1967	Bro. Daniel Bernian	Pres., LaSalle College	White
	G. Fred DiBona, Esq.	Attorney	White
	William C. Willis	Vice Pres., Temple University	White
	Charles W. Bowser, Esq.	Attorney	Black
1969	Anthony Cortigene	Amalgamated Clothing Workers Union	White
	Freeman Hankins	State Senator	Black
	Martin P. Mullin	State Representative	White

	Edward G. Bauer, Jr.	City Solicitor	White
1970	Dr. Saul Kaplan		White
	Luke Farrell	Knights of Columbus	White
	Louis Johanson, Esq.	Attorney	White
	Levy Anderson, Esq.	City Solicitor	White

B. *Plaintiffs' Statement of Contested Facts*

1. Defendant Tate appointed twelve (12) white members and one (1) black member to the Educational Nominating Panel on May 28, 1971.
2. At a later date defendant Tate replaced one white member of the Panel with a black appointee.
3. Defendant Tate appointed Mr. Raymond K. Denworth to the Panel even though Mr. Denworth was not the highest ranking officer of the Citizens' Committee on Public Education in Philadelphia.

Part IV—Law

A. *Plaintiffs' statement of the applicable law is set forth in plaintiffs' Memorandum Contra Motion to Dismiss.*

This pretrial order may be modified at the trial of the action, or prior thereto, to prevent manifest injustice. Such modification may be made either on application of counsel or on the Court's own motion.

EDWIN D. WOLF
Attorney for Plaintiffs
JOHN MATTIONI
Attorney for Defendants

Date:

Excerpts of Defendants'
Final Pre-Trial Order

* * *

Part III—Facts

A. *Uncontested Facts*

The following changes in the information contained in the Final Pretrial Order submitted by counsel for the plaintiffs should be made:

1. In Reference to Section 12-206(b)(1):
   1971 Charles Tyson, Pres., Penn Mutual Insurance Company should be changed to:
   Richard Herman, Member of the Board of Directors of the Chamber of Commerce.
2. In reference to Section 12-206(b)(6):
   1971 Freeman Hankins, State Senator, should be changed to:
   Freeman Hankins, Life Member, Board of Trustees NAACP
3. In reference to Section 12-206(b)(9):
   1971 Richard Herman, Realtor should be changed to:
   1971 Charles Tyson, Member of the Board of Directors of the Greater Philadelphia Movement (GPM)
4. In reference to Section 12-206(c):
   The designation of the year as 1970 should be changed to 1971.

This pretrial order may be modified at the trial of the action, or prior thereto, to prevent manifest injustice. Such modification may be made either on application of counsel or on the Court's own motion.

EDWIN D. WOLF
Attorney for Plaintiffs
JOHN MATTIONI
Attorney for Defendants

Date:

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

(CAPTION OMITTED IN PRINTING)

Philadelphia, Pa., August 25, 1971

TESTIMONY

Before HON. RAYMOND J. BRODERICK, J.

Colloquy

PRESENT: EDWIN D. WOLF, ESQ., *for plaintiffs*

JOHN MATTIONI, ESQ., and HOWARD D. SCHER, ESQ., *Assistant City Solicitors for defendants*

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[2] W. WILSON GOODE, sworn.

MR. MATTIONI: If Your Honor please, I ask for an offer of proof with respect to this witness.

THE COURT: Very well.

Counsel, tell us what you expect to elicit from this witness, Mr. Goode.

MR. WOLF: Yes, sir.

Mr. Goode will testify, first of all, about the availability of Black organizations to satisfy the definitions in the Charter; he will testify about the circumstances surrounding the appointment of the Nominating Panel in 1969, when the record shows there was a substantial change-off not only in individuals and the organizations that were viewed as the proper ones under the Charter: he will direct himself as to some estimate as to the charge by the defendants of laches.

He will discuss the relevance of the racial composition of the Nominating Panel to the Black community, and he will discuss the particular importance of education in the Black [3] community.

MR. MATTIONI: Since there are only a couple of areas that I would take issue with, Your Honor, I think it best to leave them until the appropriate time.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. WOLF:

Q Mr. Goode, can you tell us what your educational background is?

A I have a Bachelor's degree in History and Political Science from Morgan State College and a Master in Government from the University of Pennsylvania.

Q What professional experience have you had?

A I am Executive Director of the Philadelphia Council for Community Advancement and I am responsible for the administration of that organization.

Q What does the organization do?

A The organization is involved in the broad field of

human services with a concentration on housing, education, and community information.

Q How long have you had the position?

A I have been with the organization for five and a half years; I have been Director for almost three.

Q What did you do before you joined PCCA?

[4] A Prior to working with PCCA I was working with the Allstate Insurance Company as a management trainee.

Q And before that?

A Before that I was in the Army and before that I was in college.

Q Have you seen the exhibits in the case?

A Yes, I have.

Q Do you have a copy of the exhibits and the pleadings there?

A I believe so.

Q Mr. Goode, I would like to show you Section 12-206(b) of the Educational Home Rule Charter.

Do you have a copy of that there?

A Yes, I do.

Q Mr. Goode, I would like you, please, referring as you go down to the descriptive listings (1) through (9), you to give us, if you could, the names and descriptions or organizations active in the Black community which fit those definitions.

A Okay.

The first one would be a labor-union council or other organization of unions.

For that, one which would fit would be the United Negro Trade Unions.

Q What does the United Negro Trade Unions represent?

[5] A That represents all of the union officials who are Black and who are in unions in Philadelphia. It's a kind of a council of other officials of other Black unions.

Q What about the next one?

A The next one is a council, chamber, or other organization.

There are a number of these. One is a group called Greater Philadelphia Community Development Corporation.

Q Who is president of that?

A The president is George Archer, who is Black.

Q Who is the executive director?

A Garfield Harris, who is also Black.

The other one is the Greater Philadelphia Enterprise Development Corporation, which is headed by Clarence Farmer, who is Black, and the director is Leroy Smith, who is also Black. There are other development corporations which could fit in there which I won't go into at this point.

The third group is a public school parent-teachers association.

Under this category there is a group called the Black Educational Forum.

Q What is that organization?

A The Black Educational Forum is a forum made up of parents, but who are mostly teachers and administrators in the public [6] school system.

The fourth one is a community organization of citizens established for the purpose of improvement of public education.

Of course, here again, the Black Educational Forum could fit. The Educational Equality League, which Mr. Logan has testified to, of course, is another and they are the two major ones that qualify in that area.

The next one is a federation, council, or other organization of non-partisan neighborhood or community associations.

There are a lot of groups which would qualify there. The North City Congress, the Citywide Black Community Council, the Citywide Tenants Council, Residents Advisory Board. They are the major ones.

Q What is the Residents Advisory Board?

A The Residents Advisory Board is a board made up mostly of tenants of public housing units throughout Phila-

delphia, although there are other groups that could belong.

The Citywide Tenants Council is an organization made up of people and organizations of tenants throughout Philadelphia.

Q Mr. Goode, do you have any particular knowledge about neighborhood community associations?

[7] A Yes. I am president of a group which is called the Paschall Betterment League in Southwest Philadelphia. Living in Southwest Philadelphia, I have been president for several years.

I am a former vice-president of the Federation of Community Councils, which was a federation of community organizations throughout Philadelphia, and I worked with the Citywide Black Community Council and I have worked with the Citywide Tenants Council, I have worked with the Housing Association of Delaware Valley, which is made up of groups of Black tenants, and in West Philadelphia I have served as Chairman of the Board of the Health and Welfare Council, and for the first time that board was made up of community organizations from West Philadelphia, which is everything west of the river, about fifty groups, so I have had this substantial exposure and involvement with community organizations in Philadelphia for the past seven or eight years.

The sixth would be a league, association, or other association established for the purpose of improvement of human and inter-group relations.

Of course, the basic one which comes to mind there is the Urban League. You may also put the NAACP in that category with it.

Q Do you know who is president of the Urban League?

[8] A. The current president of the Urban League is—the immediate past-president is Mark Herman, who is Black. The current president is William Horn, who is also Black. I believe that's correct.

I believe he was just elected. I am not sure if he was elected, but I think I recollect reading that somewhere.

Of course, the NAACP is made up of five branches with a council, which is citywide, which is headed by Dr. Grinnell, who is from Germantown.

The seventh group would be a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions.

Of course, one of the groups there is the Black Youth Forum, which is made up of a group of young Black men who are interested in improvement of government.

The eighth one—I don't know of a Black institution in Philadelphia that would qualify there.

The ninth one is a council, association, or other organization dedicated to community planning of health and welfare services—of course, that could be the North City Congress, the Health and Welfare Council, the Urban League, the Black Youth Forum.

Any of those which I have mentioned before could [9] qualify there.

The important thing really is that there are a number of organizations which are in effect, which are established, which could qualify under the Charter, from which appointments could be made to the Nominating Panel.

Q Mr. Goode, I would like to refer you to Exhibit 5, Plaintiffs' Exhibit 5, which includes a list of the Nominating Panels beginning on page 5.

Do you have that?

A Yes, I do.

Q I would like to ask you to describe, if you know, some of the organizations that are listed there as having now or having had representatives on the Nominating Panel.

A Are you talking about Black organizations?

Q No. I am talking about the organizations, other organizations which in some cases might be, but I am talking about several of the organizations which are listed here. I will ask you about the organization and then I

would like you to tell me about it, what you know about it.

A Okay.

Q The first one is the Federations of Community Councils.

A The Federation of Community Councils—

MR. MATTIONI: If Your Honor please, I am going to object to this for two reasons:

[10] Number one, apparently Mr. Wolf is going to take this on sort of a piecemeal basis and those he knows the witness may know something about he is going to talk about, and apparently the others he is not going to talk about at all.

I suspect, without knowing, of course, that this witness is probably not a member of most of these organizations, although he may be a member of some.

MR. WOLF: I wish counsel wouldn't anticipate my questioning.

MR. MATTIONI: I have a problem when you want to have this witness tell us—I don't believe he is qualified as being the kind of expert to tell us what every one of these various organizations listed is, what they do, and whether there is something good, bad, or indifferent about them.

MR. WOLF: I think that such an objection as that could be brought out on cross-exam[illegible]ation of Mr. Goode, if Mr. Goode turns out not to h[illegible]

MR. MATTIONI: An objectio[illegible]n't serve the purpose of cross-examination. They are totally different.

MR. WOLF: Your Honor, if I may, I am not going to ask him about all of the names. I am only going to ask him about those organizations which are different on the 1967 and 1969 panels, that is, where there was a change, the testimony will show that in 1969 there was a particular set of nominations [11] made by the panel that were not, we believe, acceptable and the panel was housecleaned, and I would like to estab-

lish the identities of the groups that were removed and the identities of the groups that replaced them.

THE COURT: Very well.

Counsel, I will permit the questioning and I suggest that on cross-examination you can certainly bring out the facts that you think are pertinent and relevant.

BY MR. WOLF:

Q Mr. Goode, referring to the organizations which qualified or which purportedly qualified under Section 5 in 1965 and 1967, the president of the Federations of Community Councils was a member of the panel.

Could you describe for us the function of the Federations of Community Councils?

A The Federation of Community Councils was what the name suggests, and that was a federation of community organizations and Black organizations from throughout Philadelphia.

It was made up of these groups and the purpose of it was kind of to have a collective clout in particular or on behalf of all of the groups. That's basically what the group is all about.

Q Is it still in existence?

A It is still in existence in name. It is pretty much at [12] this point a paper organization.

Q When did it go out of existence?

A In other words, the end of 1968, about two and a half years ago.

Q Do you know anything about the Citywide Recreation and Playground Advisory Council?

A Yes. The Citywide Recreation and Playground Advisory Council is a federation of groups made up from the various playgrounds and recreation centers throughout Philadelphia. Of course, that's a citywide council, where all of those groups meet and elect a president.

Q Do you happen to know who the president is at the moment?

A I do not.

Q Can you describe the Urban League?

A The Urban League is an organization basically founded for the purposes of being involved in creating a better life for Blacks, although it also has in its purposes the bringing together of the races.

It primarily came into existence because of involvement in discrimination against Blacks.

Q Do you know anything about the National Conference of Christians and Jews?

A It is an ecumenical group made up of Christians and Jews for the purpose of bridging the gap between the Jewish commu- [13] nity and the Christian community.

Q Do you know anything about the League of Women Voters?

A It is a non-partisan association primarily created for the purpose of information, and that is informing the public about voter information, about candidates running for office.

It is pretty much independent in its information in terms of the effect of the politicians, in terms of the voters information in this case.

Q And the Pennsylvania Economy League? Do you know anything about that?

A The Pennsylvania Economy League is a regional organization which is primarily involved in the field of research and information in the field of finance.

It does a lot of research work, papers and documents, in order to help the cities to become better acquainted with that it ought to be doing and planning.

I have been doing this all along.

Q In 1965 and 1967 the organization was the Philadelphia Housing Association. Can you describe that to us?

A The Philadelphia Housing Association is a group created for the purposes, of course, of improvement of housing in the Delaware Valley region. Its primary purpose is one of research, but also of information; also it acts at

times as an advocate for community organizations in the field of housing.

[14] That organization was replaced in 1969 by a representative of the Health and Welfare Council.

Q Can you describe the Health and Welfare Council?

A The Health and Welfare Council is basically a recent organization in the field of health and welfare. It is kind of a clearing house of all of the various health and welfare agencies throughout the region.

One point of clarification—about three years ago the Philadelphia Housing Association did become the Housing Association of Delaware Valley. It did change its name, but its functions were essentially the same.

Q Mr. Goode, do you remember the circumstances of the appointment of the 1969 panel?

A Yes, I do, and the reason that I remember is that for a number of years a group of us have been very much interested in the whole field of education. I have been involved with the John Bartram High School Civic Council and in many other groups like the Citizens Committee on Public Education and the West Philadelphia Schools Committee.

And during that time we have pretty much kind of prepared ourselves to be aware of everything in the field of education.

Prior to the appointment, prior to 1969, we knew that there were appointments coming because of the resignation [15] of Mr. Goldman. We at that particular time decided that we were going to acquaint ourselves, and there was a big push during that time to get more Blacks on the Board of Education.

At that time we had, of course, Mr. Nicholls and Mr. Hutt, but there was a general feeling in the Black community that this was not enough representation and, therefore, there was much more needed.

There was a campaign, in fact, started at that time with letters to the Mayor and we contacted elected officials

in order to try to say to the Mayor to appoint at least a Black woman. It was stressed at that time that one be placed on the Board of Education.

Q Excuse me.

At this time in 1967 the panel was still in operation?

A At this time the 1967 panel was still in operation, and it was the 1967 panel who was going to make the nominations to the Mayor at this time.

At that particular time the Federation of Community Councils was still on. At that time Mr. Bowser was on there, Marjorie Duckrey was on there, and Mr. Hankins was also on. There were three Blacks at that time on the Nominating Panel.

The circumstances were that because of this big [16] push there were a number of Blacks who were offered to the Nominating Panel, you know, to become nominees.

The background of the Nominating Panel is that they send to the Mayor the names of two people, two out of the three for an appointment. One was a Mr. Herman Wrice, another was Mrs. Augusta Todd, two out of the three to be appointed.

At that time the Mayor made a public statement that he was not going to appoint any more Negroes to the Board because, in his feeling, they had adequate representation and that he was going to appoint someone from the nominees to the Board of Education.

He, in that statement and in talking to people on the panel—it appears that he was angered at the action of the panel.

Subsequent to that the panel was disbanded, of course, and it was reorganized, and that's when all of the changes were made in that panel.

Q Mr. Goode, why did you decide to bring this lawsuit? You are a plaintiff.

A Yes, I am a plaintiff, you know, and I can only say that I am also a parent. I have a daughter who is nine years

old, who is in the public-school system, and I have a son who is six, who has been through pre-school and who is going to be into first grade this coming September.

[17] I just could not believe that in 1971, given the racial tension that exists in Philadelphia, which exists in this country, given the composition of the population in Philadelphia, being about 35 percent Black, and given the fact that about two thirds of those students who attend public schools are Black, I couldn't believe that the Mayor would be so insensitive to the needs of the Black people and only appoint two.

And let me point out here that the thing which angered me most was, I think, that nearly the only person who was appointed was Freeman Hankins and in the Black community Mr. Hankins is not regarded as representative of the views of the Blacks because basically he is a tool for Mr. Tate, and again that is a personal thing and I say that that is the feeling there.

The fact that later on Marjorie Duckrey was put on the Board was more of an accident than something that was intended insofar as we see it.

At first, there were a number of things we thought about, and let me also say that before the appointments were made that a group of us met and wrote to the Mayor and suggested to him that we felt it was time that some appointments be made of this nature.

The letter came from a group which was called the Community Control of Schools Committee, which was an ad hoc [18] kind of group of people who met, part in the school system, part out of the school system, to talk about the affairs of the Blacks in the school system, and this letter came out from one of those meetings to the Mayor on behalf of all of us asking that there be more Blacks appointed.

It was just something and we thought about doing a lot of different things in this connection. We thought about

having public demonstrations, we thought about, you know, blocking traffic.

We talked about a lot of different kinds of things. Now we decided to file a suit because in the past we found that the courts are very friendly in terms of suits where the rights of Blacks have been in some way infringed upon.

We felt that the only hope for justice in the case was to take it to someone who was thoroughly objective and could be unbiased in terms of their views on this whole matter, and we felt that once we were able, you know, to talk about what the facts were, that the least we could get would be an objective hearing.

There was also some hope that when the community appreciation built up and when the newspapers began to suggest that something was wrong, that the Mayor would change his mind, you know, more out of expediency, and we felt that he might change his mind, so we waited for a while before filing the [19] suit.

When it became clear to some of us that he was not going to change his mind we decided that the only recourse we had was to go to court.

Q Mr. Goode, have you had other discussions than the one that you have referred to as your Committee for the Control of the Schools, with other Black citizens about the racial composition of the panel?

A Let me just say that I think that I go to probably as many meetings as anybody, and I would say that about 75 percent of all the meetings I go to, that somewhere in part of the meeting one of the things which have been talked about at those meetings has been the appointment of the Nominating Panel probably because, you see, there is a connection between the appointment of that Nominating Panel and how our Blacks see them as being dealt out of the whole system by those appointments and they felt in a sense that Mr. Tate had betrayed the Black community, and this comes back to the fact that many Blacks feel that Mr. Tate owes his election to the Black community.

You will recall the 11,000-vote plurality in that election, you know, and I was just shocked at giving the loyalty of the Black community to the Mayor in terms of the vote which he got, you know, four years ago. In fact, that his reason for being in office is due largely to the Blacks, [20] that Blacks went out and had confidence in him; and to betray the Black community in this way, I think, was a blow given them, so there has been much talk, much discussion, a lot of it anger, but much disappointment, as we believe.

Q Mr. Goode, could you tell us why, referring to this political analysis, Black people feel that the racial composition of the panel doesn't respond to their needs?

A You know, there are, of course, a lot of feelings about this. The most prevalent feeling, of course, in the Black community at the present time is that given the nature of our times, that we need in high places, meaning this time the Board of Education, Blacks who are sensitive, we need Black people.

We need the knowledge in terms of giving Black kids an image of things to look up to. Many young Blacks today feel a sense of hopelessness in terms of the system. They see the system as having dealt out Black people for the last two hundred years.

There are schools in the community today that are working to bridge that kind of a gap and who are saying if you give the system a chance it will work.

Well, what this kind of thing does is that it simply says to them that it does not work because, you know, what better opportunity would there be for a Mayor to act in the right kind of way, if his reason for being in office was [21] dependent upon Black people and then he does not respond to the Black students.

The other thing is that many Blacks want to have a control of their destiny, and that somehow there must be a field for control of what's going to happen to them, and there is a lack of confidence in Whites who are controlling

the destiny of Black kids, and this is due mostly to history, because in the past it has been proven that Whites have not worked in the best interests of Blacks, when they have in these teaching positions and the testimony of the kids from West Philadelphia High School and from Benjamin Franklin High School, the testimony as to that, because what you really get, that you find that in your Black community all of these kids see falling off, and this is straight down the line.

I have been involved for ten years in community organizations and one of the things you find is that once a community turns Black, kiss goodbye to the civic sense, and this is due primarily to the insensitivity of those who are running those operations.

Q Why is there a special concern about schools, or does the community feel this way about all civic affairs?

A I think they are concerned about the failure of civic affairs, you know. You know, if the Black people are going to make it in this country they are going to make it because of [22] education, and if you are miseducated, and if you don't really miss it, you know, there goes the interest and pride. You are not going to be able to make it in any other way.

Education is the foundation of everything—the kind of job you are going to get, the kind of housing you are going to get, the kind of reception in life you are going to have, how you are going to live and work with your fellow man.

One of the reasons that many people are involved in the field of education is because of the fact that it is the most important thing, you know, that must be right in our system if, in fact, Black people are going to begin to gain the equality which is their goal in this society.

I don't see any other thing comparable to it in terms of important.

You have been talking about the field of housing, and blight and other things, but education has to be the most

important thing, you know, because if you can't read, if you can't write, if you can't count, and if you can't think, nothing really matters, and, therefore, education has to be that foundation.

Q Do you have any contact or relationship with students?

A A lot. As I mentioned, I am involved with a group called the Paschall community group and I am very much concerned with the education of the children in the community of Paschall for [23] the last seven or eight years.

There have been many go off to college, many of the better schools in the country we have sent them off to, and we have fifteen senior-high-school children who work in the summer in the neighborhood.

We got a grant from GE. I work with the YMCA. I am chairman of the board of the Southwest Branch of the YMCA—with the YMCA in Southwest Philadelphia, which is an inter-racial group.

I work in my own community with a group of these fifteen who are this summer cleaning off lots and cleaning the neighborhood up.

I have a lot of contact with younger people.

Q Do you think that the racial composition of the Nominating Panel has an effect on students? I mean, I don't think you need to develop a trickle-down theory.

A The first statement I made, I think, is that this is inter-action with them. The whole sense of it being that if you can't trust your system, if you couldn't trust the system in 1967, the system, you know, kicks us in the backside.

The whole point simply is that much of this feeling is that if they are going to make it, they are going to make it despite the system itself.

Many of them expected that the Mayor would only [24] appoint one or two Blacks, you know, that's their regular amount.

You know, many times my idealism which makes me think everything is going to get better, but there is a

reality of the fact that they know we can go to him because I think they are more in tune with what's going on. They are probably very much less hopeful than I am in that sense.

Q What effect does this attitude have on the education of the young people?

A I am sorry, I didn't quite get your question.

Q What effect does this attitude that you have just described have upon the young people? What effect does it have on the functioning of the educational system?

A Well, you know, it varies. Some of the students get used to it. Many of them are given encouragement to go out there and show them that I have achieved something despite the system.

But to a large number of them and to far too many of them, of course, it means that they give up and lose hope. There is a whole sense of hopelessness, there is a sense of defeatism, you know, which turns into frustration, and it means school dropouts and things along that line.

MR. WOLF: Cross-examine.

CROSS-EXAMINATION

[25] BY MR. MATTIONI:

Q Mr. Goode, do you think that other people, what are referred to as other groups, should have any representation on the Board other than Black?

A Absolutely. I think that—I think that as much as possible the makeup of any board or commission should reflect the desires and aspirations of the groups which are affected by it.

I think that the difficult part here is that we are talking about two thirds of the population being black, which are effectively the statistics of this Nominating Panel, either directly or indirectly.

Certainly, I think that it involves the Puerto Ricans and other foreigners. I think that the views of the Jewish community ought to be reflected. I think that the views of the Italian community should be reflected, I think all views of other groups ought to be reflected, and I think that those desires and aspirations ought to be in some way reflected.

You know, I am not saying that the views of Blacks is the only view which ought to be had. What I am merely saying is that I want to—I am sure that the views of Black people, in fact, you know, are heard, and that the voices are there, and that there are some kinds of involvement in decision-makers which, in fact, can affect the policies which are made [26] that affect them.

Q You are not suggesting that the criteria for racial composition of the Board ultimately and of this panel now should have to reflect precisely the mathematical proportions of the school population, are you?

A No. I am not saying that there ought to be two thirds of the members of the Nominating Panel Black. I am not saying that.

I am saying that, however, there ought to be sufficient representation on that panel to reflect the goals and aspirations of that group, and I am saying that in that instance this is not the case, you know.

I am saying, well, you know, this is just not the case at all.

Q Of course, I am sure you are also not suggesting that the makeup of the public-school system is not or should not be a concern of all of us and not just those who may have children in that system?

A Right.

Q It does affect all of us, doesn't it?

A Oh, yes, but there is a difference, a big difference, you see, between being concerned in a kind of fashion and really having a kinds of sympathetic understanding and involvement with what's going on.

[27] You know, one of the problems is that far too

many Whites don't understand the dynamics of the Black community and what makes Black people tick and what makes Johnny don't come to school sometime during the year, and I am suggesting that somewhere along the line, if you are going to educate this two thirds of our population in our public-school system, there has to be reflected on the Nominating Panel and on the Board of Education, in fact, in the faculty and throughout the administration, some kind of sympathy and understanding of those things, and I don't think that you have to suffer at the present time with the kind of dropout rate we have in our school system, with the kind of absenteeism we have, with the lateness that we have, with all of the problems that we have in that kind of condition reflecting there.

That's my concern, and that's why I become emotional about those kinds of things.

Q I understand that, sir, perhaps the difficulty for a White to fully appreciate or to appreciate at all the Black man's problems, but you are not suggesting that the present Board of Education, for example, is insensitive to the students? Now, they may not react the way you think they should, but you are not suggesting here total insensitivity to what's going on?

A No, not totally, but I would go on record as saying that it is my opinion that the current Board of Education is not in [28] tune what is needed in our public-school system in order to educate our children.

Q Including the Black people on it?

A Including some of the Black members on there, yes.

MR. MATTIONI: No further questions.

MR. WOLF: I have nothing further, Your Honor.

THE COURT: Is the witness excused?

MR. WOLF: Yes, sir.

THE COURT: Thank you very much.

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

(CAPTION OMITTED IN PRINTING)

Philadelphia, Pa., September 7, 1971

Before HON. RAYMOND J. BRODERICK, J.

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* * *

[202] MR. MATTIONI: No, sir.

THE COURT: Do you have any other witnesses here?

MR. MATTIONI: Only Panel members.

THE COURT: Only Panel members?

We are in good shape, and let the record so note.

ANTHONY ZECCA, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. MATTIONI: If Your Honor please, before commencing with Mr. Zecca, on the copies of the supplemental answers to requests for admissions, perhaps in accordance with the Court's instructions that were submitted, there were two errors in the copy submitted to the Court.

On the Hartranft Community Council the Mayor's appointments numbered one and of those there were no Blacks.

THE COURT: What did the paper say?

MR. MATTIONI: Sir?

THE COURT: What did it say in the copy supplied to the plaintiff?

MR. WOLF: The original, that I am going to cor-
[203] rect, Your Honor.

MR. MATTIONI: The only thing, Your Honor, is that the copy I gave to plaintiffs' counsel was in error.

THE COURT: We understand.

MR. MATTIONI: With the Philadelphia Anti-Poverty Action Commission, the number of the Mayor's appointments is three, and the number of Blacks in those appointments is one.

With that, Your Honor, I would like to hand to you the original.

THE COURT: Thank you.

BY MR. MATTIONI:

Q Mr. Zecca, what is your position in the City government?

A I am deputy to the Mayor.

Q How long have you occupied or held that position?

A Since 1963.

Q What generally is your function as deputy to the Mayor?

A My general function is as his chief assistant.

Q Could you describe briefly what kind of things you would do in the normal course of the day?

A Well, in the normal course of the day I would take care of correspondence and see that it is directed in the proper way.

I would take care of calls from administration people to see that the information is channeled in the right [204] areas.

I would check our relationships in Washington with respect to legislation, with respect to federal programs.

I would do any—perhaps meet people in the absence of the Mayor and then report to him and generally serve as executive assistant.

Q Now, in connection with your duties as deputy to the Mayor, did you have occasion to undertake any activity with respect to the appointment of the 1971 Educational Nominating Panel?

A Yes, I did.

Q At whose direction did you undertake those activities?

A At the Mayor's directions.

Q That's Mayor Tate?

A Mayor Tate, yes.

Q In making the selections of members of the Educational Nominating Panel what criteria were used by the Mayor?

A The criteria that was used was that as outlined in the supplement, in the Educational Supplement to the Home Rule Charter.

Q Now, did you, in connection with the duties assigned to you by Mayor Tate, review past memberships in the Educational Nominating Panel?

A Yes. He asked me to prepare a list for him which I did, and I gave it to him.

[205] Q All right.

Now, when he asked you to prepare a list, was that a list of the previous nominating panels originally?

A No. He asked me to prepare a list of names for the new Panel, which meant reviewing the previous panel and updating it.

Q Now, how many members were appointed to the Educational Nominating Panel?

A Well, there are thirteen members on the Educational Nominating Panel. According to the supplement, of these nine members fall into specific classifications, that is, you operate under a number of restraints in making those appointments. You have to have the chief officer of specific organizations that fall in these nine categories.

Then there are four other appointees, which are at the Mayor's discretion, which do not fall into specified categories.

Now, in facing the categories, we use the list of the previous panel members. Where they could be reappointed in most cases they are reappointed.

Where there is a successor in office, in their office, we name the successor. This is pretty much routine. This is the main extent of what I do.

The other four were his own choice.

[206] Q And with respect to the specific people named as members of the Educational Nominating Panel, do you have with you any of your own notes you used in preparing that list?

A Yes, I have, in my briefcase.

Q Specifically, with reference to the Charter provisions in Section 12-206, would you tell me who was appointed under the category, (b)(1):

"A labor union council or other organization of unions of workers and employees organized and operated for the benefit of such workers and employees."

A That was Edward Toohey.

Q Now, why was Mr. Toohey appointed?

A Well, he is the head of the AFL-CIO in Philadelphia and it seemed as if this was the thought of the framers of that Home Rule Supplement that they meant.

He was a reappointment, incidentally.

Q Now, as far as you know, is there any other organization that would fit that general category?

A I don't believe there is another organization that would fit that category to the extent that the AFL-CIO Council operates. This is the broadest possible group.

Q Now, under Subpart (2):

"A council, chamber, or other organization established for the purpose of general improvement [207] and benefit of commerce and industry, . . ."

Who was appointed?

A The chief ranking officer at the Chamber, who in this case is Richard Herman, whose name was given to us as the member who could be appointed, because actually, the head of the Chamber is not a Philadelphian.

Q Is there any reason why the president of the Chamber of Commerce was named by the Mayor and you in making this selection?

A Well, the Chamber of Commerce—I think the wording of the Charter makes it almost implicit that it is referring to the Chamber of Commerce, referring to the use of the word "chamber."

I think that these restraints, the framers of that Home Rule Supplement practically did everything but dictate exactly who they wanted to serve in those nine categories.

Q Now, Subpart (3) calls for a "public School parent-teachers association."

Who was named to that position?

A The head of the Home and School Association. That is Mrs. Platt, who succeeded Sandy—oh—Featherman, the former head of the Home and School Association; and that's in the public schools, so that's pretty much explicit.

Still you could have appointed an individual [208] school, but we picked the entire system.

Q Mrs. Platt is head of the citywide parent-teachers association?

A Yes, yes.

Q Subpart (4) defines:

"A community organization of citizens established for the purpose of improvement of public education."

Who was named initially to that position?

A That was initially Raymond Denworth who was named because he was, or so we thought, head of the Philadelphia Committee—let me see—the Committee for Public Education in Philadelphia.

Q Did he ultimately assume the position on the Panel—

A No. There was a mixup there. A call had been made to—to Mr. Denworth's office—and a secretary had informed—this is what was told to me—had informed our people that Mr. Denworth was president, because this is the way the question was raised, "Is Mr. Denworth still president?" because that's the reason we appointed him.

Then it was brought out that he was no longer president and he wrote to Mayor Tate saying so and informing him that Mrs. Duckery was president, to reappoint Mrs. Duckery to take his place as the chief officer of the Citizens Committee [209] for Public Education in Philadelphia.

Q Subpart (5) of this section of the Charter provides:

"A federation, council, or other organization of non-partisan neighborhood or community associations."

Who was named under that subheading?

A Mrs. Anderson was named under that category. She was reappointed. She was appointed previously because she is the president of the Philadelphia Recreation Council.

Each recreation center throughout the City has such a neighborhood council, which gives neighborhood input to that particular center and their amalgamation had a set of officers of which she is president.

Q In other words, the council or organization she is the head of is some kind of a federated group of all these local organizations?

A Citywide, yes.

Q The sixth subheading indicates:

"A league, association, or other organization established for the purpose of improvement of human and inter-group relations."

Who was named to that position?

A Named to that position was Senator Freeman Hankins, as a life trustee of the National Association for the Advancement of [210] Colored People.

Q How was he decided upon?

A Well, in this case it was a reappointment because the organization would appear to fit that category.

Q Subpart (7) provides:

"A non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social or economic conditions."

Who was named to fill that position?

A Lennox Moak, the Pennsylvania Economy League.

Q What organization is he associated with?

A The Pennsylvania Economy League.

Q What position does he have with the Pennsylvania Economy League?

A I believe it is executive director.

Q Part (8) provides:

"A degree-granting institution of higher education whose principal educational facilities are located within Philadelphia."

Who was appointed to that position?

A Father Tolan, president of St. Joseph's College.

He replaced Dr. Anderson, president of Temple University.

[211] Subpart (9) provides:

"A council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City."

Who was appointed to fill that position?

A Mr. Charles Tyson as the ranking board member of the Greater Philadelphia Movement, because the co-chairmen resided outside of Philadelphia.

Q Now, is there, except for the appointment of Reverend Tolan, any reason why other people than those that were appointed were not appointed to the Panel under these eight categories?

A I don't follow you.

Q In other words, with respect to these appointments were there other organizations that could have fit under these various categories?

A I presume you could find some that would fit, surely.

Q Is there any reason why the organizations that were chosen were, in fact, chosen by the Mayor?

A Well, according to the Mayor's views these organizations were the most representative and who had the widest diversification of interests.

Q Now with respect to the remaining four appointments, how [212] were they made?

A They were selected by the Mayor himself.

Q What part, if any, did either the race or ethnic background of potential appointees to the Nominating Panel play in the selection process?

A To my knowledge, the specific ethnic—the specific racial part or aspect didn't enter into it outside of the classifications.

BY MR. WOLF:

Q I didn't hear that.

A Outside of the classifications, those nine classifications, spelled out classifications, but not particular race.

BY MR. MATTIONI:

Q Well, was the Mayor, to your knowledge, concerned with the racial composition of the Panel?

A The Mayor's concern for the racial composition of

this Panel is the same as his concern in others. He wants to make sure there is representation, although this doesn't extend to any degree so far as numerical representation.

Q Do you know why Levy Anderson was appointed to the Panel?

A He is the City Solicitor and the previous panel had the previous City Solicitor.

Q Is there any other reason why he was appointed, as far as you know?

[213] A Well, Mr. Anderson has a number of qualities. Outside of his specific duties as City Solicitor, he has been a long-time Philadelphian, he has worked other than in the field of law. He has been in industry, he put his son through public schools, he is a solid character, a solid individual who would lend, I believe, weight on this Panel.

MR. MATTIONI: Cross-examine.

CROSS-EXAMINATION

BY MR. WOLF:

Q Mr. Zecca, you said that you had been deputy to the Mayor since 1963.

What did you do before that?

A Before that I was press secretary to the Mayor and before that I was for seventeen years a reporter for International News Service.

Q Your testimony is that you were the person who presented to the Mayor the organizations that qualified under the nine subsections of the Charter?

A Yes, sir.

Q Along with names who would apparently represent those organizations?

A Yes, sir.

Q Did he make any changes in those?

A Not in the names that I gave him, no, sir.

[214] Q Did he make any changes in the organizations?

A No, sir—I am sorry, let me amend that.

The names that I have given, the degree-granting institution, I gave Dr. Anderson and he said well, he served last time, give it to another one, and he put Father Tolan in.

Q Did he suggest St. Joseph's?

A No, Father Tolan, yes.

Q He suggested specifically Father Tolan?

A That I can't recall whether it was specific or whether he suggested get another one and move it around.

He may have given me one or two; I just can't be specific.

It probably wound up with the Mayor in the end selecting Father Tolan, yes.

Q I see.

Did you give the Mayor any advice regarding the appointment of the four discretionary appointments?

A No, sir.

Q Did you remind him that he had these appointments to make?

A No, sir. He told me.

Q He knew that he had to make them?

A Oh, yes, yes.

Q Do you know whether anyone else gave him any advice with regard to this?

[215] A I don't know, sir.

Q What did he say to you regarding his responsibility in appointing these other four individuals?

A He didn't say anything about his responsibility. He said to me to put these people on the Panel. He told me when I got it all together, the four that he would appoint.

Q You testified, I think,—

A Oh, excuse me. The only other one, that is one that I did, I did mention to him Levy Anderson.

Q You testified in describing the composition of the

Panel that nine are representatives of organizations and that four are at the discretion of the Mayor; is that correct?

A Yes.

Q Is that your understanding of the City Charter?

A Yes.

Q I would like to show you Section 12-206(c) of the supplement and I would like you to read it.

THE COURT: What is that you are showing him, counsel?

MR. WOLF: This is a copy of Education Home Rule Charter. This is the section that I cited.

THE WITNESS: "In order to represent adequately the entire community, the four other members of the Educational Nominating Panel shall be appoint- [216] ed by the Mayor from the citizenry at large."

BY MR. WOLF:

Q Does that sound to you like discretion?

A Oh, yes.

MR. MATTIONI: Objection, sir.

I think Mr. Zecca has already testified that the Mayor made the four appointments.

The only conversation concerning those four was on the appointment of Levy Anderson, and with respect to any legal interpretation of this document that is a matter for the Court.

He is asking now for him to give his opinion as to what this means.

THE COURT: Frankly, I am going to let the answer stand and overrule your objection because I feel that in his testimony he, in effect, said that the four were in the discretion of the Mayor.

I don't see where there is any problem, so I note the objection, overrule it, and permit the answer to stand.

BY MR. WOLF:

Q Did you give the Mayor any advice regarding his responsibility to be sure that the community was adequately represented?

[217] A Oh, no. This is advice you don't have to give Mayor Tate.

Q Mr. Zecca, yes or no?

A No, I did not.

Q Thank you.

Mr. Zecca, you testified that in selecting the organizations to submit to Mayor Tate you looked to the past list and generally selected the same organizations?

A Yes.

Q You characterized this as pretty much routine?

A Yes.

Q Now, what happened in 1969 to disturb that routine? Did you apply the same reasoning with regard to the appointment of the Panel in 1969?

A Partly.

MR. MATTIONI: Objection.

THE WITNESS: Partly, I believe, but I don't know what you are referring to.

THE COURT: Mr. Zecca, you had better hold your answers when counsel for the City objects.

MR. MATTIONI: The objection, Your Honor, is that the composition of the Educational Nominating Panel appointed in May of 1971, as far as anything that occurred in 1969, I think, is totally irrelevant in this case.

THE COURT: I am going to permit the witness to [218] testify and we will rule on the relevancy at a later date and let your objection stand.

We will see whether it is relevant or not after we get the answer.

BY MR. WOLF:

Q Mr. Zecca, what responsibility did you have with regard to the appointment of the Educational Nominating Panel in 1969?

A I probably had some of the same responsibility which I exercised with this one, although I don't recall. I don't recall specifically whether I did, in fact, get the names together like I did this time.

I believe I got most of it done.

Q You testified, Mr. Zecca, that it was pretty much routine to reappoint past members of the Panel.

A I testified so far as this time went, and I think in previous cases it has been the same thing, to the best of my knowledge, yes.

Q Mr. Zecca, we have had testimony that in 1969 there were a number of changes—

MR. MATTIONI: Objection, sir.

There was no testimony in any of the defendants' case of that fact.

THE COURT: He may ask the question or not.

MR. MATTIONI: We have had evidence, you have to [219] ask this witness your question. He shouldn't be confronted with something which may or may not have been proven, Your Honor, and has nothing to do with this.

MR. WOLF: Your Honor, as far as being proven, it is stipulated that there were a number of changes made in 1969 in the organizations.

THE COURT: That was stipulated to?

MR. WOLF: Yes, sir.

THE COURT: We will note your objection.

This is a question, I think, Mr. Mattioni, where your objection is on the basis of relevancy.

MR. MATTIONI: I am saying, Your Honor, it is certainly beyond—

THE COURT: Anything that is within, we will just

say, the general ball park, I am going to let in, and we will pass on the relevancy of it later and note your objection.

MR. MATTIONI: This is certainly beyond the realm of direct examination, Your Honor. This witness testified to only one function and one duty and responsibility he has assigned to him by Mayor Tate.

THE COURT: You know, you are asking the Court to pass upon an objection to a question that counsel never completed. I don't have the question in front of me.

Would you complete your question?

[220] MR. WOLF: I think I had better start it over again.

THE COURT: Let's start the question over again. The witness would appreciate that.

BY MR. WOLF:

Q Mr. Zecca, it has been stipulated by counsel that in 1969 there were several changes in the designated organizations and I would like to ask you whether you recall those changes and whether you recall why they were made, particularly in view of the fact of your testimony that reappointments are pretty much routine.

MR. MATTIONI: If Your Honor please,—

THE COURT: We have had the question now.

MR. MATTIONI: If Your Honor please, the stipulation is not that there were changes or not changes.

The stipulation is to the fact of who was appointed, who was not, and so on.

THE COURT: The stipulation is in writing. What does it say?

MR. WOLF: The stipulation really sets forth the names and organizations of the members of the Nominating Panel.

It is perfectly clear there is no language that says

in 1967 under Subparagraph (6) of the Charter the organizational representation changed from the Urban League to the [221] National Conference of Christians and Jews, yet it is perfectly clear that that did occur.

THE COURT: Counsel, apparently Mr. Mattioni's objection is in connection with the qualifying phrase that "it was stipulated."

Ask your question without including the stipulation and I am sure Mr. Mattioni will continue his previous objection as to relevancy, but I don't want the witness misled as to what was stipulated or what wasn't, and I don't think it will have any other effect on the answer of the witness.

BY MR. WOLF:

Q Mr. Zecca, it has been stipulated that in 1967 the Federation of Churches was the organization that satisfied the selection under Subparagraph (5) and in 1969 the Citywide Recreation and Playground Advisory Council was selected to be the organization under Paragraph (5).

Similarly, in 1967 the Urban League was the organization under Paragraph (8) and in 1967 it was the National Conference of Christians and Jews.

Similarly, under Paragraph (7) in 1967 the organization was the League of Women Voters and in 1969 the Pennsylvania Economy League.

Similarly, under Section 9 it was the Philadelphia Housing Association in 1967, and in 1969 it was the Health [222] and Welfare Council.

Now can you enlighten us at all as to why these changes were made, and if they were made, how you can square that with your testimony that it was pretty much routine to reappoint the same people who served on previous panels?

MR. MATTIONI: If Your Honor please, he has now asked the witness in one question about four questions, and I think just for the sake of clarity this shouldn't be permitted.

I don't know what question now he is going to answer.

THE COURT: I think you understand.

MR. MATTIONI: I understand, certainly.

BY THE COURT:

Q Do you understand the question, Mr. Zecca? If you don't, say so, because you are the one who has to answer it.

A I think I get the thrust of it.

BY MR. WOLF:

Q Well, having given you the facts that are of record let us be specific and precise.

Do you recollect those changes in organization designations?

A I recall some of them, but I think—

Q Do you recall why they were made?

A No, but when I say, when I testified earlier, pretty rou- [223] tine, I am not saying it was an established practice simply to reappoint. I said it is pretty much a routine.

Now, there have been changes. There have been some changes. We changed from Temple University to St. Joseph's, for example.

There have been other changes from time to time. There could be any number of reasons. Sometimes just there's more than one group at a time that does something to bring them into representation.

But when I am talking about pretty much routine I am talking about a pattern that is followed, when the Mayor says get a list.

You get up a list, and basically it's the same, and specifically I am testifying between this year and the last Panel, and you will see that it is pretty much a matter of the same people.

Q Did he tell you to select the same ones each year?

A No.

Q Did he tell you the time before not to select the same organizations?

A I don't recall what he told me the time before; probably just the time to make the appointments, get up a list.

Q Mr. Zecca, do you recall the controversy over the appointment of a successor to Mr. Goldman on the School Board?

[224] A No, I don't.

Q That was in 1968, in May 1968, when the Mayor was publicly criticized and made a public statement that was testified to that he was not going to appoint any additional Negroes to the Board of Education.

Do you recall that statement?

A No, I don't. I don't remember the Mayor ever saying that he was not going to appoint any additional anything to the Board of Education.

Was that—well,—

Q If that statement were reported in the newspapers would the Mayor have taken steps to deny it or would you have taken steps?

MR. MATTIONI: Objection, sir.

BY MR. WOLF:

Q Steps to see that that erroneous impression was corrected?

THE COURT: There is an objection to that question.

What is the basis of your objection?

MR. MATTIONI: If Your Honor please, now we are getting into the realm of pure speculation. The witness has just testified that he has no knowledge of any such statement ever being made by Mayor Tate or being attributed to Mayor Tate, so why should he sit here and try to decide what would [225] have happened if he knew about it or if the Mayor knew about it?

THE COURT: I will sustain your objection.

It is rather technical, but it calls for speculation.

MR. MATTIONI: Of course, the other ground, Your Honor, is that he is talking about the Board of Education and here at issue is the Educational Nominating Panel.

BY MR. WOLF:

Q Mr. Zecca, you were, I believe, working for the Mayor in your present position in 1964 and 1965; is that correct?

A Yes.

Q That, therefore, was during the time of the operation of the Educational Home Rule Charter Commission; is that correct?

A That's correct; yes.

Q Were you aware of the operations of the Commission?

A I was aware of them. I knew they were going on but I wasn't directly involved with them at that time.

Q In attempting to or in selecting the organizations that were to send a representative to the Educational Nominating Panel did you at any time consult with any members of the Educational Home Rule Charter Commission to discuss with them what their intent might have been in their drafting of the Charter?

MR. MATTIONI: Objection.

[226] I think again we are just going all over the lot, Your Honor.

This witness has testified as to what procedure he followed in carrying out his assignment from Mayor Tate.

MR. WOLF: Your Honor, this witness testified about the selection of the AFL-CIO—that it was the thought of the framers of the Charter—and I would like to explore with him just a little bit what he knows about it and what he thought the thought of the framers of the Charter was.

THE COURT: I am going to overrule the objection because this is cross-examination, Mr. Mattioni, and the witness in his direct testimony expressed many conclusions as to the interpretation of that Charter.

MR. MATTIONI: Your Honor, I object to your characterization of what he said. He said no such thing.

All he did was take the Charter and what it seemed to mean to him.

THE COURT: I am going to overrule your objection because I recall the witness specifically having testified in connection with the AFL-CIO that that was probably the intent, I recall he said, as far as he was concerned, of the framers.

MR. MATTIONI: That's correct, Your Honor, as far as he was concerned.

[227] THE COURT: Right.

That's all we want to find out—what he knows.

Proceed with the witness.

You had better read the question back, Mr. Lennox, so everybody will have it as it is asked.

(The reporter read the pending question as follows:

"Q In attempting to or in selecting the organizations that were to send a representative to the Educa-

tional Nominating Panel did you at any time consult with any members of the Educational Home Rule Charter Commission to discuss with them what their intent might have been in their drafting of the Charter?")

THE WITNESS: No, I did not.

BY MR. WOLF:

Q Did you at any time review any of what we will characterize as the legislative history of the drafting of the Charter?

A Now are you speaking in connection with this particular Panel?

Q Well, at any time, at any time.

A At any time?

Q Did you ever, for example, look at minutes of their meetings?

[228] A No, I did not.

Q Did you at any time look at statements that various members might have made?

A No, I did not, but let's say back when the Educational Nominating Panel—when the Charter Commission was formed, I was not handling this work at that time.

The job of administration, George Forde, was the one who did the original background work on this, came up with the original listings, some of which we are still using, and we have changed others.

Q I see.

So your understanding of the AFL-CIO as the organization thought of as appropriate by the framers is based only on your supposition?

A This is all that I said, yes.

Q Mr. Zecca, I have been given and I was told that there will be introduced into testimony a good bit of material by Mr. Mattioni regarding the process of drafting the Educational Home Rule Charter and I would like to show you some of this and ask you about it.

MR. WOLF: If Your Honor will indulge me, there is a fairly substantial amount of material here.

THE COURT: Counsel, the Court would like to make a statement for the record that in order to expedite things I [229] know that Mr. Mattioni had and he may have been right in some instances—you may be right in none and I may be right in none, but any time you have an objection as to relevancy of this testimony just make an objection on the ground of relevancy and the Court will overrule that objection and we will take it into account when we make our findings of fact.

As you know, we don't have a jury here and I am not going to permit any fishing expeditions or anything like that.

I may, at one of these junctures, say that you are absolutely right at that point, but it won't be necessary for you to go into it.

We will note this on the record.

MR. MATTIONI: Fine, Your Honor.

THE COURT: The same thing, incidentally, is going to apply to you, Mr. Wolf.

MR. WOLF: Yes. Thank you, Your Honor.

BY MR. WOLF:

Q Mr. Zecca, is it your understanding of the Educational Home Rule Charter that the framers intended to designate specific organizations that they had in mind?

A Not specific organizations, but specific classifications.

Q Well, Mr. Zecca, how is that consistent with your testimony regarding, for example, the AFL-CIO, that that was the [230] thought of the framers of the Charter and that there is no organization that would fit that to the extent that the AFL-CIO could?

You testified that reappointment was pretty much routine.

A Yes.

Q Where organizations were already appointed, you generally continued them.

MR. MATTIONI: Objection sir.

Now, this is not a relevancy objection at all. This is a distortion of the testimony.

If he is going to start characterizing the testimony of the witness I think he should do it in terms of what he specifically said; otherwise just ask questions.

Now he uses the terminology "routine," but I think to characterize it as saying we reappoint as a matter of routine is inappropriate because that is not what he testified to.

MR. WOLF: I think that if we review the testimony you will see that on numerous occasions Mr. Zecca said that this was a reappointment.

That is the only way he explained Mr. Hankins, that this was a reappointment.

Levy Anderson was a reappointment. We can call [231] it the citizens' committee because they had been on before. This was a reappointment of the organization; the same thing with the Chamber of Commerce.

MR. MATTIONI: If Your Honor please,—

THE COURT: Mr. Mattioni's objection to your, in effect, putting on the record the fact that Mr. Zecca said it was routine—

MR. MATTIONI: Your Honor, if he wants to argue his case let's stop the testimony and we will argue the case.

If he wants to cross-examine let him cross-examine.

THE COURT: The only thing that I am concerned with is whether or not he used the word "routine."

Do you recall?

THE WITNESS: I used the word "routine," but—

THE COURT: That's all I asked.

We don't want to misstate your testimony.

Can you pick another word?

MR. MATTIONI: There is no question that he used the word "routine." I am only talking about characterizations by counsel, which are intentionally made to mislead the Court because he is talking now about routine in a different context than the witness used it.

THE COURT: Counsel will rephrase his question, [232] and your objection is sustained.

MR. WOLF: I shall, of course.

THE COURT: By the way, this is a short question. Instead of going back and reading that testimony, ask your question again.

BY MR. WOLF:

Q Mr. Zecca, you testified on several occasions on direct examination that you made reappointments of individuals and in some cases reappointment of organizations.

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q Why did you do that?

A Because the organizations stood the test of time, so to speak. This was the Panel that proceeded in the previous selection of Board members and apparently done its job properly and there hadn't been widespread objection to the Panel before or to the organizations.

Q And you regard that as the appropriate criterion?

A At present I do, yes.

Q Mr. Zecca, let me read to you two statements by Mr. Albert J. Nesbitt, who was chairman of the Educational Home Rule Charter Commission, and one letter from him to Mr. Dilworth.

MR. MATTIONI: If Your Honor please, I don't ob- [232] ject to counsel reading from these. I am

going to introduce all of these documents into the record, but I maintain prematurely, however, he is going to burden this record with a lot of irrelevancies in the sense that the witness has already testified now that he hasn't gone into these, into the so-called legislative history of the Charter Commission writing the Home Rule Charter.

Now he is going to be confronted with an instant analysis here, "Tell me what this means."

THE COURT: Mr. Mattioni, you have me in the position, with many of your objections, that you object before I hear the question, and it is very, very difficult to rule on a question I haven't heard.

Now let me hear the question.

I know you said you were going to read, Mr. Wolf, from two letters. I haven't seen the letters; I hope they are not long.

MR. WOLF: No, sir.

THE COURT: If you and counsel can agree that you are only going to read a portion or a short part of it, it would help the record.

MR. WOLF: I am only going to read a portion of it relevant to this question that we are discussing now.

THE COURT: What are you going to ask the wit-
[234] ness so we will have the question?

MR. WOLF: Then I am going to ask him whether his testimony as to how he selected the organizations to recommend to the Mayor is consistent with the position expressed by the chairman of the Home Rule Charter Commission.

MR. MATTIONI: This is what I assumed he was going to do, Your Honor; and, of course, I think my objection now speaks for itself.

THE COURT: And your objection is based on what?

MR. MATTIONI: On the basis here that he is

going to now ask Mr. Zecca to interpret his own conduct and say whether it is consistent.

In order to do that he's got to make an instant interpretation of what these documents really say and then, of course, there is the question whether what is in these letters is really representative of the final result of the Charter Commission's recommendations to the people and adopted in the form of the present Home Rule Charter Supplement.

THE COURT: Again we note your objection and we will proceed.

BY MR. WOLF:

Q Mr. Zecca, in Mr. Nesbitt's statement of December 2, 1964, he said regarding the Educational Panel, the Commission believes that it must be constituted and composed in a manner [235] that safeguards the Mayor's basic accountability, that produces maximum representativeness of the entire community, and that assures responsiveness to the dynamics of educational progress and community change and development of Philadelphia.

In a letter of March 5, 1965, from Mr. Nesbitt to Mr. Dilworth he again talks about the Panel and he describes that the Panel should be constituted in a manner which produces maximum representativeness of the entire community and assures responsiveness and flexibility relating to community change over the years the Charter Supplement would be in effect.

Further on he says by special categories rather than particular organizations, the Commission recognizes the reality of change in community and civic organizations over a long period of time.

That's the end of the quote. Now, Mr. Zecca, in view of these statements by Mr. Nesbitt, how do you regard your rather routine appointment of the same organizations that sat in 1969?

THE COURT: Counsel has an objection to the word "routine," so just strike "routine" and answer the question.

MR. MATTIONI: Not only "routine," but my objection is to this whole line of questioning, not merely on the ground of relevancy.

I think I said before there is no sense repeat-
[236] ing it.

MR. WOLF: Your Honor, with regard to routine, Mr. Zecca used the word.

THE WITNESS: Can I describe the word for you?

MR. WOLF: Please do.

THE WITNESS: I want to make it very, very clear that I used the word "routine" procedurally.

I do not use the word "routine" to diminish in any way, shape, or form the importance of the assignment of the Panel.

BY MR. WOLF:

Q We don't suggest that you do.

THE WITNESS: Or the importance of the Panel.

MR. MATTIONI: I object, sir.

Counsel has interrupted the witness twice now, and I think he ought to permit him to give his answer.

THE COURT: Counsel, don't interrupt the witness.

I just want the record to show that this witness, I think, is well able to take care of himself in these proceedings.

Let's just proceed and let him answer.

If you have more, answer it.

THE WITNESS: When I used the words "pretty much routine," I mean that I didn't have to, because of the prior [237] precedent, because of the prior panels, because of the prior activity, work that had been done not by me, but this wasn't the first Panel to be appointed. I assure you that on the original

panels there must have been a lot more work that went into it, but based on all of this, what I had to do was take the organizations that already had been represented and already had done well as witnessed by the product of their endeavors, that is, the members of the Board and Mr. Dilworth, that Mr. Nesbitt wrote to as a member of the Board.

BY MR. WOLF:

Q That was before the composition—

A He being a member of the Board now; that's right, and this is what I meant by "routine," but not to diminish in any way, shape, or form the importance.

Q Mr. Zecca, that's exactly what I thought you meant by "routine."

A It didn't sound that way to me.

Q I am sorry, that's exactly what I thought you meant and the question that I asked you, having read to you the one statement by Mr. Nesbitt in the one letter, is whether Mr. Nesbitt's view in any event—the weight of his view is for the Court—regarding the responsiveness of the membership on the Panel to community changes played at all a part in your consideration.

A I think that the results of the selection show that Mr. [238] Nesbitt's intent has been borne out. You take the members of this Panel and take them one by one and see what they stand for, see who they are and see what they represent, I think that it represents a great diversification of interest in the community, I think it represents the thought, the knowledge, the ability, and the motivation to do their jobs correctly.

Q I am not suggesting in any way that it doesn't. I am asking you only a very narrow question, and that is whether it is a recognition of the reality of change in community and civic organizations over a long period of time.

A Well, what do you think that means, these words?

I think that it is flexible enough that in the greater context of that meaning I think that this Panel represents it. I think it is representative of the people in Philadelphia.

Q I am not asking you that.

My question was whether you gave consideration in selecting the organizations that were to be represented on the Panel to the idea that the mechanism of selecting this Panel was to guarantee responsiveness to community changes over a period of time.

A I think that's inherent in these organizations.

Q Now, in what way is the selection of the same organizations in 1971 that sat in 1969 responsive to community change? [239] Now, I am not asking you about the merits of the organizations; I am asking you about selecting the same organization. I am asking you what went through your mind when you decided to select the same organizations.

A Can you be specific?

Q Well, you selected the same organizations, for example, the AFL-CIO. You selected that each time.

A Right. Now, the AFL-CIO is certainly responsive to the times. The organization, the amalgamation of all these labor unions and boards, is certainly responsible to the times, as far as labor goes.

The Chamber of Commerce of Greater Philadelphia certainly must be responsive to the times in the management and business life of the City, which is what the Charter asked for him.

The Home and School Association is a living, changing organization, and so with the rest of them.

Q Mr. Zecca, do you know the racial composition of the Philadelphia schools?

A Very generally. I imagine it may be 60 or 65 percent Black.

Q Do you know what the racial composition was when the Educational Home Rule Charter was enacted?

A I would think it was less at that time.

[240] Would you still think that responsiveness to change in the community would suggest that there should be more Black representatives in 1971 than in 1965?

A On the Educational Nominating Panel?

Q Yes.

A Not necessarily.

Q Mr. Zecca, you testified that Mr. Herman's name was given to you as a man who could be appointed from the Chamber of Commerce.

Who gave that name to you?

A Mrs. Forman.

Q Mrs. Forman gave it to you?

A The secretary of the Administrative Board.

Q Do you know how she found out?

A I had asked her to get someone from—the top person from the Chamber of Commerece and she called.

Q Exactly what did you say to her?

A I said, "We need somebody from the Chamber of Commerce to fill this category."

John Bracken is no longer the president or I would have appointed him. Mr. Ballengee succeeded him, so we needed another ranking officer who lives in Philadelphia.

I asked her to check with the Chamber and find out, and she came back with that answer.

[241] Mr. Zecca, do you recall just what the Charter says about representatives from these organizations?

A It says that they have to be Philadelphians and the next higher-ranking member—

Q The next higher-ranking what?

A Member, or something member of the organization.

Q Would you read to me Section 12-206(b). You have it in front of you.

A Yes.

Q All right.

A "Nine members of the Educational Nominating Panel shall be the highest-ranking officers of City-wide

organizations or institutions, which are, respectively:" . . .

Q All right.

Now will you please read Subsection (d).

A "in the event no organization as described in one of the Clauses (1) through (9) of Subsection (b) exists within the City, or in the event there is no such organization, any one of whose officers is a registered voter of the City, the Mayor shall appoint the highest-ranking officer who is a registered voter of the City from another organization or institution which qualifies under another [242] clause of the subsection."

Q Now, did you mean you are attempting to say that that authorizes the Mayor to appoint a high-ranking member of any one of these organizations?

A I don't follow you.

Q Are you able to distinguish between a member of the Board of Directors of an organization and an officer of the organization?

A Do you mean am I able to?

Q Yes. Is that a distinction in your mind?

A Yes, it is a distinction, of course.

Q There is a difference between an officer and a member of the Board of Directors?

A No. Sometimes you are an officer and a member of the Board of Directors.

Q Certainly, you can be, but there is a distinction between someone who is an officer and someone who is only a member of the Board of Directors?

A A distinction other than title?

Q Yes.

A That's right.

Q Now, what does the Charter say you are to to get?

A The highest-ranking officer.

Q All right.

[243] Now, is Mr. Herman an officer of the Greater Philadelphia Chamber of Commerce?

A I think he is a member of the Board of Directors.

Q All right.

Now, what does the Charter say you are supposed to do when you can not get an officer?

A He is an officer when he is a member of the Board of Directors.

Q Do you mean every member of the Board of Directors is an officer?

A That's an officer. It's a matter of how I gain—what is the officer?

Q Yes, that's the question, isn't it?

MR. MATTIONI: Yes. That's argument for the Court, Your Honor.

Again I think we are needlessly wasting the time of the Court, especially in view of the fact that you have enjoined me to complete my defense in one day.

THE COURT: Mr. Wolf, don't close in on Mr. Zecca when you are asking the questions.

MR. WOLF: I am sorry.

THE COURT: Try to keep back near the counsel table. I won't require you to remain seated because of the poor acoustics here, but—

[244] BY MR. WOLF:

Q Mr. Zecca, do you know whether Mr. Herman is a member of the Executive Committee of the Philadelphia Chamber of Commerce?

A No, I don't.

Q Mr. Zecca, regarding Freeman Hankins, you testified that first of all he was a reappointment?

A Yes.

Q The stipulation filed by counsel in this case states that the representative under 12-206(b)(6) in 1969 was Joseph P. McLaughlin, a member of the National Conference of Christians and Jews.

Now, Mr. Hankins was on the panel the previous time?

A Yes.

Q He was not, according to the stipulation, representing the NAACP.

A I think that that stipulation may be in error because I think that Mr. McLaughlin was the Mayor's choice. He also was representing the NAACP.

Q Fine. I am very happy to have that straightened out.

What position does Mr. Hankins hold in the NAACP?

A It is my understanding that he is a life trustee.

[245] Q Who told you that?

A Again, there is Mrs. Forman, who is the secretary of the Administrative Board and I obtained the information from her.

Q Did you inquire as to the availability of the president of the organization?

A No, I did not.

Q How come?

A I asked her is Mr. Hankins still the representative as the top officer and she called back with the report that he was.

Q Mr. Zecca, do you know anything about the organization of the NAACP in Philadelphia?

A No, sir.

Q You do not?

A Other than generally what is the NAACP.

Q You know what it is?

A Oh, sure.

Q But you don't know anything about its organization?

A Nothing particular, nothing specific.

Q Do you know what the title of the organization is?

A National Association for the Advancement of the Colored People.

Q Is it the Philadelphia chapter or what?

A I understand it's the Philadelphia chapter.

Q Did it at all surprise you that a life trustee was the [246] highest-ranking officer who lived in Philadelphia from the Philadelphia chapter of the NAACP?

A No.

Q It didn't?

A No, sir.

Q Where did you think the officers lived?

A It is not a matter of where I thought the officers lived. This is a matter of checking to see whether or not Senator Hankins fell into this category and was still eligible to be appointed, and word came back to me that he was.

Q Whom did you ask to do this for you?

A I said Mrs. Forman.

Q And exactly what did you say to her?

A I said, to the best of my knowledge, "Is Senator Hankins qualified for the appointment for the NAACP?"

Q Did you advise her what the Charter said?

A No. She knows it. It's her job to know what the Charter requires.

THE COURT: Let the Court interrupt.

BY THE COURT:

Q Who is Mrs. Forman?

A Mrs. Forman is secretary of the Administrative Board, who take care of appointments to boards, commissions,—

Q She is an employee of the City of Philadelphia?

[247] A Oh, yes, yes.

THE COURT: I just wanted her identified.

BY MR. WOLF:

Q What about Mr. Moak? Is he a director or an officer of an organization?

A Surely.

Q Who isn't an officer of an organization?

A One that doesn't have a title, I would presume.

Q What do you think the purpose was in the Charter of requiring that the representative of the organization be the highest-ranking officer thereof?

A To make sure that you get a proper spokesman and one who properly reflects the attitudes and aims of the organization in question.

Q And you think the selection of anyone, of someone who has not been elected an officer by the Board, is appropriate to do that?

A Will you repeat that, please?

Q And you think that the selection of someone who has not been elected by the Board of Directors or the Board of Trustees of an organization is an appropriate person to represent the organization?

A I don't know that Mr. Moak wasn't elected by the Board of Directors or the Board of Trustees.

[248] Q But you don't know that he was?

A I don't know that he was.

Q I take it with respect to the Greater Philadelphia Movement your testimony would be that since Mr. Tyson is a Board member he is an officer of the organization?

A I checked with Mr. Rafsky, who is the Executive Director of the GPM and he came back with the name of Mr. Tyson.

Q As the highest-ranking member of the organization?

A That's right.

Q What did you ask Mr. Rafsky to do?

A I asked him for the highest—well, I knew that the president— there are three co-chairmen, none of whom live in Philadelphia, and I called Mr. Rafsky and I said who under the Charter would qualify as the top member of the GPM to serve on the Board, to serve on the Nominating Panel; and he came back with the name of Charles Tyson.

THE COURT: Counsel, are you getting near the conclusion?

I am only thinking about this Court having a recess.

MR. WOLF: Yes, sir. I am on my last points from his testimony, Your Honor.

BY MR. WOLF:

Q Mr. Zecca, could you tell me the name of any other orga- [249] nization that would satisfy the definition described in Subsection (1) of 12-206(b) that you have in front of you?

A Not in the context, no, I couldn't.

Q All right.

What about No. (2)?

A You could have a local—

MR. MATTIONI: If Your Honor please, I object to the question not merely on the ground of relevancy, but because Mr. Zecca has already indicated that there may well be other organizations that may qualify under various categories.

I don't think that's at all relevant. The only issue is whether or not the ones that were utilized were appropriate. The fact that there may be others I don't think is an issue at all.

THE COURT: Has the witness testified that there may be other organizations that could have qualified?

MR. WOLF: My recollection does not extend to that, Your Honor.

THE WITNESS: Yes.

MR. WOLF: My recollection is that he testified with regard to the first one that the AFL-CIO was the most appropriate.

THE COURT: I recall that specifically.

MR. WOLF: But I would just like to find out.

[250] After all, he is the person responsible and I would like to find out whether he knows of any other nizations that would satisfy these qualifications.

MR. MATTIONI: If Your Honor please, of course, he is not the person responsible. The Mayor of the City of Philadelphia is.

He was performing certain activities which he testified to at great length at the direction of the Mayor.

THE COURT: I will note your objection and permit him to answer on the basis that he is the man that apparently was preparing the list for submission to the Mayor.

If you will generalize that question I think this cross-examination can be cut short. We are going entirely too long, I think.

MR. WOLF: I think this will surely be the longest cross-examination, Your Honor. This is critical, as you so well said.

THE COURT: I don't mean the longest one on record.

MR. WOLF: I surely hope not.

THE WITNESS: I might say that you have the Joint Building Trades Council, for example, but that's one specific area. The AFL-CIO is a joint council.

[251] BY MR. WOLF:

Q I can recognize—

A The same with the Chamber of Commerce.

Q Excuse me.

A The same way with the Chamber of Commerce.

Q Do you mean that there is no other citywide organization which is a comparable chamber or other organization able to stand for the general improvement and benefit of commerce and industry?

A No, there is not. I would say not in the context with the Greater Philadelphia Chamber of Commerce.

Q What do you mean "in the context"?

A Well, not to the scope. If somebody asks you who represents management and industry in the Philadelphia area, what group, wouldn't you automatically say the Greater Philadelphia Chamber of Commerce?

Q If I were—

THE COURT: Counsel, you don't have to answer the question.

THE WITNESS: I am sorry.

BY MR. WOLF:

Q I think the point that I am trying to get to, Mr. Zecca, is whether you know of any other organizations that would satisfy these criteria.

[252] A Not directly. There may be others. Oh, there is the Philadelphia Industrial Development Corporation, who is in industry. There is HUD, the Port Development Corporation, which is commerce, but generally aligned to the port.

There is a Northeast Chamber of Commerce.

Q Is that citywide?

A I am sorry. That's not citywide, but there are those two.

Q What about a community organization of citizens established for the purpose of the improvement of public education?

Do you know any other organizations, such as the Committee on Public Education in Philadelphia?

A Yes, there are a number of them.

Q Citywide organizations? Can you name them?

A Not offhand, but I have a listing of some of them.

In this case, the Citizens Committee on Public Education was chosen, too.

You see, as much as possible, we try to stay with what we had that was tried and proven and precedent, because as soon as you do make a change, then somebody comes

up and says they make a change for a purpose to get so-and-so in.

Whereas, if you try to do it the way that you have done it all along, you can minimize some of this.

Q All right.

Mr. Zecca, do you think there should be a Black [253] in the Mayor's cabinet?

MR. MATTIONI: Objection, Your Honor.

THE COURT: I will sustain that objection.

I don't think that's relevant to these proceedings. These proceedings, as I understand it, apply only to the Nominating Panel.

Is that right, Mr. Wolf?

MR. WOLF: Yes, sir.

BY MR. WOLF:

Q Mr. Zecca, would it have occurred to you to recommend to the Mayor the appointment of a panel consisting of eleven Blacks and two Whites?

MR. MATTIONI: Objection sir.

THE COURT: I will overrule that objection. I will pass on the relevancy later.

Proceed.

THE WITNESS: Let me put it this way:

First of all, let's confine ourselves to the nine in the classification.

It would have occurred to me to recommend nine Blacks to the Mayor if nine Blacks were representative of these classifications.

BY MR. WOLF:

Q Yes.

[254] A If there were nine Whites that represent the nine classifications, there would have been nine Whites.

Q Did you look for nine Blacks to represent these classifications?

A No, I didn't look for nine Blacks, nor did I look for nine Whites.

I looked for nine people that would show the diversity of these qualifications. I don't feel that you have to be Black to think Black, no more than being Black to take up this four.

I don't think that the color was specified in the Charter and I think that the only place that it does come out is in the intergroup classifications, which recognize that aspect.

But rather than color I think that these classifications represent diversification of the utmost interests and motivations.

Q What do you think the effect on the public would have been of appointing all nine Blacks from those organizations?

MR. MATTIONI: I object, Your Honor.

I think we are getting out of hand.

THE COURT: I will sustain that.

We are getting a little speculative now and I don't see where that's relevant.

[255] BY MR. WOLF:

Q Were you concerned at all on the effect on the Black community of those eleven Whites and two Blacks to the Panel or twelve Whites and one Black to the Panel?

MR. MATTIONI: Objection, sir.

Again—

THE COURT: I will permit him to answer that question. I will note your objection.

MR. WOLF: Let me rephrase it because you are only responsible for nine.

BY MR. WOLF:

Q Were you at all concerned about the effect on the Black community of having eight of the nine organizational representatives White?

A No. I was concerned because of the fact that they weren't Black doesn't mean that they were not representative or that they couldn't be adequate spokesmen for them.

Q Let me ask you this—if you were Black, how would you feel about it?

A Well, they say you don't know what it is really to be Black unless you are Black.

I don't know, therefore, how I would feel about it. I think that if I were a Black, a member of the Black group, that was eligible and should have been elected or should [256] have been selected and was not, I would feel bad.

Q Do you think that there are no Black groups that meet the definitions of the nine organizations?

A Well, rather than think whether there are no Black groups or not, think of which of those groups doesn't stand the test and which of these groups that are in here would you want to disregard in order to select another Black group.

It is not a matter of cutting somebody out, it's how many can you fit in.

I am not saying to you legal language or legal interpretations or what the law is or what not, but stitting where I sit, sitting where I sit close to the Mayor's office, sitting where I sit in government and watching government change as it has done in the past ten years, you have to do what you think is right. Your motivation is in the right direction.

Sure, we are aware of the great surge of the Black community in the last decade, so much more than in the previous decade.

I came into the City government back in '58, so I went through the sixties, which were quite turbulent, and I have seen the advances that especially we have done in Philadelphia, and I feel certain that we have come so far, a long way, not only as represented in the Panel, in the selection of [257] the Board of Education, in our attitudes to the

Black community, and the Black community's attitude to the responsiveness of the City government, if there is such a thing as the Black community.

There are so many Black communities in Philadelphia and it's the idea of doing it right. You could have had, as you said, eleven members, eleven Blacks, and you probably could come up with the names of eleven Blacks, none of whom will be acceptable in what men consider the Black community.

I think that we have done a tremendous job with Mayor Tate.

Q Why then has the number of Blacks on the Nominating Panel declined since 1965?

A How much has it declined by? We have two. How many did we have?

Q We didn't have very many to start with.

A How many did we have in 1965? I don't know, but it could be the classification.

MR. WOLF: No further questions.

REDIRECT EXAMINATION

BY MR. MATTIONI:

Q Mr. Zecca, you were asked whether or not you advised Mayor Tate of his responsibility with respect to the appointment of the Nominating Panel and I think the context was with respect [258] to responsiveness to the racial composition of the City; and you answered that you did not give him any advice.

You started to explain why not. Would you indicate why you did not?

A Well, at that time, I said you never have to talk to the Mayor about that. Mayor Tate is a political person from what I guess you would call the old school of politics, the old breed.

Whenever they do anything, the old breed, you look

at the qualifications, you look at diversification, you look at religion to make sure that wherever possible you have this broadest representation in the background.

This is not only the representation but diversification and the fact that we were touching all bases and you make sure that such a representative is an adequate spokesman, so this is something, a comparatively new business. You don't have to tell an old pro like Mayor Tate.

MR. MATTIONI: Thank you.

No further questions.

MR. WOLF: No questions.

Thank you very much.

Oh, I am sorry, Your Honor. May I ask one additional question?

I sent out for a piece of paper and it came in. Will you indulge me?

[259] THE COURT: And I will explain to Mr. Zecca that lawyers always think of one more question.

MR. WOLF: I am going to ask him—

MR. MATTIONI: May I see that paper, please?

MR. WOLF: Yes, surely.

THE COURT: As soon as the witness answers this one question we are going to take a ten-minute break.

RECROSS-EXAMINATION

BY MR. WOLF:

Q Mr. Zecca, we were discussing earlier a statement by Mayor Tate in 1969 that he would not appoint any additional Negroes to the School Board and you said you didn't recall that statement.

A I said I don't think that he made such a statement.

Q Well, all right.

May I show you a very bad copy of a page of the Philadelphia Inquirer, Saturday, May 3, 1969, and the article

says he indicated, referring to the Mayor, he would not appoint another Negro to the Board because the Negro community has good representation in the two Negroes now serving on the Board.

Do you recall that article?

MR. MATTIONI: Objection, sir.

Even the question of recalling the article I think is objectionable.

[260] Reading what is stated in there is obviously hearsay, if nothing else. Here is a newspaper article where the source is not identified, of somebody who says that Mayor Tate said "X."

THE COURT: Do you mean you can't believe everything you read in the newspaper?

MR. MATTIONI: If you read some of the writeups concerning this particular case, I think that's quite true.

MR. WOLF: The article further on states the source.

THE COURT: Wait a minute.

We have an objection to the question. What is the question again? Do you recall that article?

MR. WOLF: Do you recall—

THE COURT: This is a question of relevancy here but I am going to permit the witness to answer and note your objection.

The question is do you recall the article.

THE WITNESS: I don't recall the article specifically but it doesn't say he is not going to name another member.

It said that he indicated that he wouldn't name another member; and this is, of course, the reporter's version of this, but the quote said the Negro community has good rep- [261] resentation in the two Negroes now serving on the Board.

They may have asked him whether he was going

to appoint any more Negroes to the Board and he said the Negro community has good representation on the Board as it is; just like it has excellent representation right in this story.

BY MR. WOLF:

Q You don't recall, however, this having happened?

A No.

MR. WOLF: No other questions.

THE COURT: Thank you very much.

THE COURT: We will have a ten-minute recess now. We will be back promptly at 11:15 by that clock.

(A recess was had.)

THE COURT: All right, Mr. Mattioni, your next witness, please.

MR. MATTIONI: Mr. Johanson, please.

MR. WOLF: Your Honor, may I inquire whether Mr. Mattioni is going to run through the whole Panel before he calls Mr. Vagasky?

MR. MATTIONI: It was not my intention.

THE COURT: I didn't hear that. I would love . . .

* * *

[333] Q Did you take into consideration such factors as race, religion, ethnic background or social background, or sex in your own consideration of possible appointees?

A Absolutely no, but my first three choices were three blacks.

Q In your opinion, having served on the Educational Nominating Panel, do you feel that the members of the panel went about their work in a fair and impartial manner?

A Yes, having been on the Nominating Panel since its inception, I would say that this panel rates as high as any of the other previous panels to conduct itself in an orderly fashion and a very businesslike fashion; and I'd have to say nothing but the very highest as far as the conduct and performance of this panel are concerned.

MR. MATTIONI: Cross-examine.
MR. WOLF: No questions.
THE COURT: Thank you very much, Mr. Toohey.

THE COURT: All right. The next witness.
MR. MATTIONI: Mr. Farmer, please.

CLARENCE FARMER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MATTIONI:

[334] Q Mr. Farmer, what is your position with the City of Philadelphia?

A I am chairman of the Philadelphia Commission on Human Relations.

Q How long have you held that position?

A Well, I was the executive director for two years and I have been chairman for two.

Q For two?

A Two years, yes.

Q Before you were connected with the Philadelphia Commission on Human Relations were you active in community organizations?

A Why, yes. Prior to that I was president of the Greater Philadelphia Enterprise Development Corporation.

I have been actively involved in the business community as president of the Farmer Press, Incorporated, which is a printing business; and I have been actively involved in many community organizations, yes.

Q In your position as first executive director and then chairman of the Philadelphia Commission on Human Relations and in your other community work, have you had occasion to come in contact with various groups and organizations within the City of Philadelphia?

A Yes, I have.

Q Have you had contact with Black or predominantly Black [335] organizations?

A Yes. The work of the Commission brings us in contact with many social, civic, and community organizations, both Black and White; and we work throughout the whole City and naturally, in contact with these organizations and we get to know them, get to know the people who run them, get to know who runs them, and what the nature of their work is.

Q Sir, are you familiar also with the Educational Home Rule Supplement which was adopted in 1965?

A I assume some familiarity with it, yes.

Q Now with respect to Section 12-206, which provides for the Educational Nominating Panel, there has been testimony with respect to certain Black or predominantly Black organizations as suggested alternatives to those actually used by the Mayor.

MR. WOLF: I would like to object to that characterization of them.

THE COURT: State the basis of your objection.

MR. WOLF: The basis of it, sir, is "suggested". They were simply possible alternatives.

THE COURT: Revise the question to include your language.

MR. MATTIONI: We will assume the question has been changed. The question has been so amended. Now, if the witness understands it he can answer it.

[336] BY MR. MATTIONI:

Q With respect to the organizations which were identified, I want to ask you some questions under each of the categories.

Section 12-206(b) provides for representation on the panel of,

> "A labor union council or other organization of unions of workers and employees organized and operated for the benefit of such workers and employees."

It has been suggested that the United Negro Trade Unions Council meets that general criteria.

A In my opinion, Mr. Counsellor, it does not meet that qualification.

Q Do you know what the council is, sir?

A The Negro Trade Union Council is an organization that's not made up of craftsmen. I assume that we are talking about craftsmen in a particular trade or craft union, and I would say that the Negro Trade Union Council is not that type of organization.

MR. WOLF: Your Honor, I think the answer is unresponsive to the question.

Perhaps if Mr. Mattioni will give Mr. Farmer a copy of the Home Rule Charter it will avoid needless cross examination on my part.

MR. MATTIONI: I will do that, Your Honor. We are here under (1), first of all.

[337] BY MR. MATTIONI:

Q My question specifically is, Mr. Farmer, whether the United Negro Trade Union Council, if you please,—

A The feeling—at least my own personal opinion of the composition of the Negro Trade Union Council is that it is one that does not fit Item No. 1 here, and I think it reads "labor union council or other organization of workers and employees organized and operated for the benefit of such workers and employees;" and my opinion is that it does not fit that category.

Q Now under subparagraph (3) provides—of course, you have it in front of you—

"A public school parent-teachers association."

A suggested possible alternative to be an organization to be used was the Black Educational Forum.

MR. WOLF: Objection,—I am sorry, I don't object.

BY MR. MATTIONI:

Q Are you familiar with the Black Educational Forum?

A Yes, sir. I am familiar with the Black Educational Forum and my opinion is that it does not meet this category either.

This reads "a public school parent-teachers association" and my interpretation of the Black Educational Forum is a group of Black administrators within the school system.

Q Now under subpart (4) it provides,

"A community organization of citizens established [338] for the purpose of improvement of public education."

Again, one of the suggested possible alternatives is the Black Educational Forum.

A My answer would be yes, that it does meet that qualification in Item No. 4.

Q Are you familiar, Mr. Farmer, with the Black Youth Forum?

A No, I am not.

Q Mr. Farmer, I take it from what you have said that you are and have been active in what sort of has been classed as the civil rights movement for many years.

A Well, I have been somewhat involved in community activities and civil rights on occasions, yes.

Q Are you familiar with the employment pattern of the City of Philadelphia?

A The City of Philadelphia's employment patterns?

Q Yes, the City as an employer

A Yes, am very familiar.

Q Can you state, Mr. Farmer, first in general terms without any breakdown as to what levels of employment we are talking about, that is, by importance of position, are you able to indicate approximately the number of Blacks percentagewise employed by the City of Philadelphia?

A Yes. The number of Blacks employed in the City of Philadelphia [339] in civil service positions and otherwise is approximately forty-one percent of the total number of employees.

Q And how does that compare, Mr. Farmer, with, for example, ten years ago?

A Oh, it's much higher than it was ten years ago. As a matter of fact,—

Q That is, the percentage of Blacks is higher?

A Oh, yes.

Q Are you able to estimate how much higher it is?

A No. I am sorry, I don't have those figures, no.

Q Is it, as far as you know and from your own experience, a substantial difference now?

A Yes, yes, there is a substantial difference.

Q Now, Mr. Farmer, in your own experience both on the Commission on Human Relations of the City of Phila-

delphia and in your general experience, can you give me an opinion as to the record of the Tate administration in terms of progress in this City achieved toward the goal of racial equality in employment?

MR. WOLF: Your Honor, I object to that.

THE COURT: What is the basis of that objection?

MR. WOLF: It establishes no qualifications of this witness as an expert to answer that.

He is the chairman of the Commission on Human Relations for the last four years. We have established it is a mayoralty [340] appointment—

THE COURT: But counsel, the previous question was asked—

MR. WOLF: All he established was that before that he was a printer.

THE COURT: No, no. The previous questions that were asked by Mr. Mattioni have been how many were employed, or at least that was his response; and he was asked about how this compared to ten years ago, was it?

MR. MATTIONI: Yes. That's correct, sir.

THE COURT: The witness said that he didn't know. Now the question is what is the record of the Tate administration in that regard; is that correct?

MR. MATTIONI: Yes, sir.

MR. WOLF: That's approximately ten years.

THE COURT: Maybe he didn't recognize the question the first time and he recognizes it now.

Is it ten years?

MR. MATTIONI: I don't know the specific number of years, Your Honor. I couldn't say.

I know it is somewhere between eight and ten years, but I don't know the specific number.

THE COURT: It is a question of relevancy and there is no jury.

[341] The witness may answer, if he can.

THE WITNESS: Yes. Although I don't believe that Blacks have enough appointments in City government, I do think that in the last four years, in the last ten years, there has been a tremendous mark of improvement among Blacks, the representation that Blacks have had in key positions in the City government, and I think much of this can be attributed to Mayor Tate and his leadership of the City government, yes.

BY MR. MATTIONI:

Q Now, Mr. Farmer, I think you have indicated that overall there are approximately forty-one percent Blacks in City employment?

A That's correct.

Q Is there a substantial difference in percentages as you go up to the higher-paid positions?

A Well, the statistics point out that twenty-three percent, approximately twenty-three percent or twenty-four percent of the management personnel in supervisory positions or middle management are minority individuals, so I would assume that you could take from that what you would like to.

In private industry, middle management, the percentage of minorities in middle management is about five, five and a half, or six percent, so you can see there has been quite a difference in what the City projects and what is projected in industry as a point of comparison.

[342] Q I take it then, of course, the higher up you go the percentages get smaller?

A Naturally.

Q With respect to representation on boards and commissions as opposed to employment positions, have you noted anything of the same kind of pattern?

A Over the last four and ten years? What period are you talking about?

Q In your own experience, as long as you have been an observer of the City government.

A I have noticed—I have observed recently that the percentage of minorities have increased on the boards and commissions over the last four to five years, yes.

MR. MATTIONI: Cross-examine.

CROSS-EXAMINATION

BY MR. WOLF:

Q What has it increased to, Mr. Farmer?

A Counsellor, I don't know what it has increased to, but I have seen indications of it increasing.

BY THE COURT:

Q Let me ask, Mr. Farmer, when you use the term "minorities", what do you mean by that?

A I am thinking of Blacks and Spanish-speaking Americans.

BY MR. WOLF:

[343] Q Mr. Farmer, has the Commission on Human Relations done a study of racial breakdowns in employment in Philadelphia?

A Yes, we have. Are you talking about City employees?

Q Yes.

A Yes, we have.

MR. WOLF: May I ask that that be produced? Mr. Farmer has testified about facts relating to employment and it seems to me that we ought to have the benefit of the Commission's study.

THE COURT: Apparently there is no objection.

MR. MATTIONI: I don't have it, Your Honor.

BY THE COURT:

Q Is that available?

A It is public information, Your Honor. As a matter of

fact, a news release was just published recently in the Philadelphia Daily News indicating these same facts.

MR. WOLF: I would just like to state—

BY THE COURT:

Q Would it be difficult to obtain the study today in order to put it in the record, or a copy of it, I assume?

A I think we can produce a copy, Your Honor.

THE COURT: Very well.

You have no objection?

MR. MATTIONI: If Your Honor please, of course, I am [344] not quite certain now what I am supposed to do other than produce a statistical document.

THE COURT: I think Mr. Wolf indicated that Mr. Farmer had testified to percentages and Mr. Farmer indicated that the commission of which he is chairman had made a study of those percentages.

I think that the actual study should be a part of the record unless counsel has some objection.

MR. MATTIONI: I have never read the study, Your Honor, so I don't know if I would or wouldn't have any objection to it.

MR. WOLF: Your Honor, it seems to me that here we have the chairman of a commission testifying about his impression. There is a study in existence. I have attempted to get it and was told that it was not public information in response to a recent letter.

I think that the document ought to be produced and that we ought to be allowed to cross-examine Mr. Farmer or whoever else produced the report.

BY THE COURT:

Q Let me just ask, do you have a copy of it with you?

A No, sir, I do not.

THE COURT: He doesn't have a copy and we are going to close this record today.

I can only say that Mr. Farmer has agreed to produce a [345] copy of it and I think he would agree to give you a copy and agree to give counsel and the Court copies.

If there is any reason why at that juncture there should be additional testimony in connection with it the Court will pass on it then.

MR. WOLF: Fine. Thank you very much.

THE COURT: But I still say—let me just ask this of Mr. Farmer.

BY THE COURT:

Q A copy, I take it, is available back in the office?

A There is one copy, Your Honor.

Q How long is this? What sort of document are you talking about?

A The document is this big and there was a news release that was public information and most of the information was confidential and the other information was information that was made public through the newspapers and the press.

Those are the files that I was quoting today.

THE COURT: All right.

He has agreed to produce a copy.

MR. MATTIONI: Of course, Your Honor, what Mr. Farmer was referring to in his answer was that portion or those portions of this document which were confidential.

I said before I don't want to be in a position of not [346] having reviewed the document and saying I have no objection. I don't know whether I would or I wouldn't.

THE COURT: I would assume by the same token

that Mr. Wolf may not want it after reading it, but he is the man who asked for it; the witness has agreed to produce it.

This court, in accordance with the way I have permitted both sides to ask questions, has said let's admit it and when we make findings we can determine what is relevant and what isn't.

MR. MATTIONI: I was only concerned now with the indication that part of it was considered confidential and I don't know what part he is talking about, not having read it.

THE COURT: I certainly don't know.

MR. MATTIONI: The only thing I am concerned with now is that there is something there which should not be disclosed to the public view. Then we would request the opportunity to bring that to your attention; that's all.

THE COURT: You will have that opportunity.

The only thing we have at the moment is that the chairman of that commission has indicated that he would produce it and if it is relevant I think it should be in evidence.

We will wait and see.

MR. MATTIONI: Yes, sir.

BY MR. WOLF:

Q Mr. Farmer, you stated that the Negro Trade Union Council [347] does not fit the definition of 12-206(b)(1).

Do you still have the charter in front of you?

Could you tell us in what respects it does not fit that definition?

A Yes. My interpretation of this, Mr. Wolf, is that an organization of unions of workers, and I think the Negro Trade Union Council has solicited its membership from the general community and not from a specific group of workers.

Q You mean they solicit non-union people?

A Right.

Q Well, based on your knowledge of trade unions, does that surprise you that a Negro trade union group, particularly since it involves building trades—do you regard it as surprising that they are not able to solicit union members?

MR. MATTIONI: Objection, sir.

There is no testimony that they are unable to solicit.

THE COURT: I will sustain the objection.

I think you could reframe the question. The question is not whether this witness is surprised or not. The question is what are the facts.

BY MR. WOLF:

Q Mr. Farmer, it is your testimony that the Negro Trade Union Council does not fit because the people who belong to it do not belong to unions?

[348] A Correct.

Q What is your experience with regard to the ability of Black workers, particularly in the building trades, to become members of the Building Trades Union?

MR. MATTIONI: Objection, sir.

I think that is not relevant in view of the fact that we are now concerned with whether this particular organization meets the definition; not why it doesn't meet it.

THE COURT: I will note your objection but in accordance with my ruling this morning we will let it in and we will pass on the relevancy later.

THE WITNESS: I would like to hear the question again.

THE COURT: I don't blame you. I would too.

What is the question?

(The reporter read the pending question as follows:)

"What is your experience with regard to the ability of Black workers, particularly in the building trades, to become members of the Building Trades Union?"

THE WITNESS: My experience has been, Mr. Wolf, that it has been very difficult for Blacks to become members of the critical trade unions, the critical building trade union.

I am aware of the difficulty of Blacks to get into the unions. It is not one of the critical trade associations, no.

[349] BY MR. WOLF:

Q Was not the difficulty that Blacks had in becoming members of unions one of the reasons for the creation of the Negro Trade Union Council?

A I don't think so. I don't know anything about what the reasons were for the recent Negro Trade Union Council. I am not sure.

Q Mr. Farmer, in (b)(2), can you name for us any organizations in the Black community that meet that definition?

A Yes, I can. The Greater Philadelphia Enterprises Development Corporation is one.

Q What else?

A Well, there is another called the Greater Philadelphia Community Development Corporation, as the second one.

Q What about No. (4), Mr. Farmer? Can you give us the names of organizations in the Black community that fit that definition?

A I would think that—I would just about think that any community organization that was identified with the public schools would fit that category.

Q Are there numbers of those associations?

A I would think that the Black Home and School Association could probably.

Q Mr. Farmer, I am sorry, under (b) it is required to be a citywide organization.

[350] A Citywide, yes. The Educational Equality League, possibly.

Q What about No. (5)?

A The Urban League, possibly the Urban League or the NAACP.

Q What about the Residents Advisory Board?

A The Residents Advisory Board could.

Q The Citywide Tenants Council?

A Yes, it could.

Q What about No. (6)?

A The Urban League, the North City Congress.

Q What about No. (7)?

A NAACP. I guess the SCLC. That's about all.

Q The Black Youth Forum?

A That could qualify, yes.

Q What about No. (9)?

A (9)? Possibly the Urban League.

Q All right.

Mr. Farmer, you are a defendant in the employment discrimination case brought in 1970 by the Commonwealth of Pennsylvania and several other organizations involving the Police Department; is that correct?

A Correct.

Q What are the allegations against you in that, sir?

MR. MATTIONI: Objected to.

This, I think, goes far afield—what the allegations [351] are there have nothing to do with this case.

Allegations are nothing but allegations.

THE COURT: Yes. I am concerned about the relevancy in this matter of what the allegations are.

If this is a question of fact within the knowledge of the witness as to what the situation is, I would per-

mit such a question; but as to the allegations I am going to sustain the objection, recognizing that people can allege anything.

BY MR. WOLF:

Q Mr. Farmer, the City's Commission on Human Relations has certain responsibilities with regard to City employment; correct?

A Correct.

Q How would you describe those responsibilities?

A Well, I guess you would say that the Commission on Human Relations has responsibility to assure everybody an equal opportunity in employment in the City government.

Q Mr. Farmer, is it true that in the last two to five years the percentage of Blacks, except in the Police Department, has increased?

A In the last how many years?

Q Say two, recently, within the last two to four to five years.

A I am not sure that I know at this point.

Q Isn't it your responsibility to assure that Blacks have equal opportunity in City employment?

[352] A Well, actually, the responsibility for the recruiting of personnel is actually the responsibility of the Personnel Department and is really not our responsibility, sir.

Q I thought you said it was your responsibility to assure that there was no discrimination.

A We look for discrimination, yes, and when we find discriminatory practices or a complaint is brought to our attention, it is our department's responsibility to try to ferret it out and see if it can't be resolved.

Q Mr. Farmer, did you have served on you a copy of the complaint in this case, I mean the police-discrimination case?

A Yes.

Q Did you read it?

A Yes.

Q Did you read the sentence in paragraph 21 of the Second Amended Complaint that discrimination against Black applicants has markedly increased over the past four years, whereas during this period forty percent of all applicants to the Police Department, the percentage of Blacks, and applications received by the department has dropped from about thirty percent in 1969 to less than about eight percent in 1970?

Did you read that?

A I remember personally reading it, but I am not familiar with it now.

[353] THE COURT: Are you standing for an objection?

MR. MATTIONI: I am waiting for the next question, Your Honor, mindful of Your Honor's statement that I shouldn't object prematurely.

THE COURT: I already sustained your objection to the question about the allegations in the complaint and I think counsel is getting dangerously close to that type of a question again.

BY MR. WOLF:

Q Did you do anything about it?

MR. MATTIONI: Objection, sir.

THE COURT: Do anything about what?

MR. WOLF: Your Honor, if I may clarify,—

THE COURT: Do anything about what?

MR. WOLF: Do anything about this allegation, about this statement.

THE COURT: I will permit the witness to answer.

THE WITNESS: I am not sure, Your Honor. Do anything when?

BY MR. WOLF:

Q When you received this or when you read this? Subsequent to the time that you read that in 1966 thirty percent of recruits were Black and in 1970 only eight percent of the recruits were Black, did you take any action?

A Sure. We have done certain things, yes.

[354] Q What action did you take?

A One of the things we did was to institute a seminar, to which we invited the Personnel Department to attend, and we made very clear to our own Personnel Department, as well as other personnel people throughout other industries and throughout the City, in the main course, the Duke Power Company decision, which we think is an important decision as far as testing is concerned, and we felt that that was an area which our Personnel Department needed some policing in.

Q Was anyone on your staff aware of this discrimination in Police Department hiring?

A No, we were not.

Q Mr. Farmer, it is true, is it not, that one of the issues that is viewed as critical by the Black community is the problem of police conduct?

MR. MATTIONI: Objection, sir.

I don't know what police conduct has to do with this case.

THE COURT: I am going to sustain that objection.

MR. WOLF: Your Honor, if I may, the basis of Mr. Farmer's testimony is that he is chairman of the Commission on Human Relations and his responsibility to do everything to see that Blacks are treated properly by the City, and his opinion testimony that Blacks have been treated very well by the City. [355] It seems to me relevant, as I have just demonstrated, that the Commission was unaware of a twenty-two

percent drop in Black recruits in the Police Department.

It seems to me relevant that police misconduct is regarded as a critical activity in the Black community and the Human Relations Commission is not responsible.

It seems to me other actions the Commission has or has not taken—

THE COURT: I have ruled on that specific question.

MR. MATTIONI: Your Honor, before you do that, let me say this:

First of all, the questions now are based on the assumption of the accuracy of the allegations in this other complaint.

Now that is a court action which is being vigorously defended and prosecuted and the final result of what may happen there is yet to come and whether the allegations are factually accurate or not, there is no evidence in this record to make a determination.

THE COURT: As a matter of fact, this witness has testified that he didn't know.

MR. MATTIONI: This witness has repeated that he didn't know and, of course, I think the only fair inference is whether that allegation is accurate and it is from this house of [356] cards that further questions are being asked.

THE COURT: Let's hear this question.

BY MR. WOLF:

Q Is it not true that police misconduct is an issue of critical importance to the Black community?

THE COURT: I am going to sustain the objection there on the ground of relevancy.

I said I was going to let most everything in, but I think we are getting a little out of the ballpark now.

BY MR. WOLF:

Q Mr. Farmer, do you think the Mayor is a fair-minded person on the question of race?

A I don't know, Mr. Wolf, how you can determine who is fair and unfair.

I would hope that the Mayor is a fair-minded person. I work for him and I work for the City of Philadelphia and I don't think that I would want to work for somebody who is unfair nor would you.

Q Do you think the Mayor's non-civil-service appointments show a fairmindedness on race?

A As I said before, Mr. Wolf, I do not really feel that the City has been actually completely supporting of the Black community as it should have been.

I really believe that many of the appointments there [357] should have gone to more Blacks and the more minority appointments, and I think that the Mayor has done a pretty good job if you compare what he has done with other mayors in the past.

Q Do you think five out of fifty-three of over $20,000 appointments is a pretty good job or any kind of a job at all?

A I am not familiar with five out of fifty-three.

Q Well, I have them here. Here is a list. I am sorry, it is fifty-six.

Here is a list of non-civil-service appointments over $20,000 in the City at the present time, fifty-six of them, and there are five Blacks—yourself, Mr. Hardy, Mr. Scruggs, Mrs. Watson, and Mrs. Duckery.

Your position is that that's a pretty good job?

A Well, I think the Mayor has improved over the other mayors who made appointments in the City of Philadelphia.

Q O.K.

I take it you regard an increase from zero to one on a number of these boards and commissions and authorities as the Mayor doing better than the previous mayors?

A I can consider that is an improvement.

Q All right, just as long as we know that's what you are talking about.

Mr. Farmer, what was your response when the Educational Nominating Panel was named and there was only one Black on it?

[358] A Well, my own personal response?

Q Yes.

A My own personal feeling was that I felt that there should have been more, more representatives from the minority community, yes.

Q Did that appointment bolster your view that the Mayor was fair-minded with regard to race?

A I think the Mayor has to weigh very carefully how he makes his appointments and who he appoints; and I have no reason to pass any judgment one way or the other on the Mayor's appointments.

Q Do you think that the appointment process in the context relating to the School Board is particularly important to the Black community?

A Absolutely.

Q Why?

A Well, first of all, the majority of the schools, the personnel of the schools, are made up primarily of Blacks. I think that the average person in the average Black community looks to the schools as a source of, well, where you can look to the schools as a place where they go to develop understanding in the community.

I think the schools play an important part in their scheme in the Black community and, therefore, I think it's important that we give them as much support as we possibly can.

MR. WOLF: I have nothing further.

[359] MR. MATTIONI: No questions.

THE COURT: Thank you very much, Mr. Farmer.

THE COURT: Now your next witness, Mr. Mattioni.

MR. MATTIONI: He has been sequestered, Your Honor. I will bring him in.

THE COURT: You don't want to run a few of these fellows now because I recognize they have some valuable time commitments.

(Discussion off the record.)

JAN VAGASKY, having been duly sworn, was examined and testified as follows:

THE COURT: Do you have his background summary there?

MR. MATTIONI: I have it in the pretrial order.

THE COURT: Do you wish to read into the record whatever you want the record to contain about his background in order to expedite the matter?

I thought we had agreed on that.

MR. WOLF: I am perfectly happy to stipulate to what is in the pretrial order. I don't know what that does.

THE COURT: Let's ask Mr. Mattioni to state that, just to expedite.

He will read your background and let me just say if [360] you have any objection to anything he reads you just raise your right arm and we will correct it.

MR. MATTIONI: 3-3-71 through 8-29-71 this

witness was employed by the City of Philadelphia as an industrial liaison officer. From August 30, 1971 to the present time as City Economist.

His educational background is the receipt of his Baccalaureate from the State Gymnasium, Presov, Czechoslovakia; two years study at Hanbels-Hochschule in St. Gallen, Switzerland, and a Bachelor's and Master's degree in Economics from Columbia University, New York.

MR. WOLF: Your Honor, I think I would ask for an offier of proof at this point so I know whether or not to ask Mr. Vagasky any other questions.

THE COURT: Yes.

MR. MATTIONI: If Your Honor please, I intend to prove through Mr. Vagasky the national statistics on employment in the range of $15,000 and over and to have him show a comparison between the national statistics and the City of Philadelphia statistics, which will show that civil service employees in the $15,000 and over category represent 6.7 percent of the work force.

THE COURT: For my information, are we comparing the Philadelphia situation with other governmental situations or just with national figures?

[361] MR. MATTIONI: With national statistics.

THE COURT: Generally?

MR. MATTIONI: But also to show the statistics in the City and the difference between civil service, non-civil service, and the Mayor's appointments to boards and commissions to show the increase in percentages.

THE COURT: Increase since when?

MR. MATTIONI: The increase by comparison, a comparative difference between civil service $15,000 and over, civil service and exempt, an aggregate figure, exempt employees, which are Mayor's appointments, exempt employees $20,000 and over, because those

were the figures given by the plaintiffs, and the Mayor's appointments to boards and commissions.

I will ask the witness to draw a conclusion as to what that represents.

THE COURT: Let's proceed.

I think maybe you will have objection by-way of cross-examination here.

DIRECT EXAMINATION

BY MR. MATTIONI:

Q Now, Mr. Vagasky, have you reviewed the latest data submitted by the Bureau of the Budget respecting the proportion of Black people among the highest-paid persons in America?

A I have looked at the consumer income statistics. I assume [362] that's what you are referring to.

Q Now can you tell what those statistics reveal with respect to the percentage of Black persons in the population who earn in excess of $15,000 a year?

A Well, the ones I was reviewing showed about ninety-eight percent of the White population earning $15,000 or more. If you include the state employment—federal, local, and state employment—the statistics go down to about ninety-six percent.

So I comment that the percentage of Blacks versus Whites would be between twenty-two, really 66 to 89. Okay?

Q Have you had an opportunity to review the number of Black persons in civil service positions earning $15,000 and upwards employed by the City of Philadelphia?

A I saw the statistics shown to me. I believe they were prepared from the data provided by the Department of Finance, and to the best of my recollection they went from 6. something all the way to about 12. There might be some decimal-point variations. I see so many figures that I can't recollect all of them. It varies from 6 to 12 in progres-

sive ratio starting with civil service and finishing with the Mayor's appointments.

Q In other words, you are saying that the lowest percentage is in the civil-service area?

A That's correct.

Q And that the percentage increases as you get up to the Mayor's [363] appointments?

A The Mayor's appointments, based on the statistical data shown to me.

Q Now are you able to draw any conclusions with respect to the Mayor and how he relates to the percentage of appointments of Blacks, percentage of initial employment with the City or appointment of Blacks to other positions?

A Obviously, those were the lowest statistics, the sixty-seven percent. There is less chance of people being employed because of professional requirements.

I assume that the twelve percent, which indicates the Mayor's appointments, amounts more to appointing the people that he thinks should be done. That's the only deduction I can make.

MR. MATTIONI: Cross-examine.

CROSS-EXAMINATION

BY MR. WOLF:

Q Mr. Vagasky, where did you get the nationwide figures?

A From the Consumer Income figures. It's the Bureau of Standards, Department of Commerce publication.

Q Do you have a copy of it here?

A Not with me, but I assume it is over there.

MR. WOLF: I wish the record to show this is the first time I have been shown this information.

MR. MATTIONI: May the record show that you were [364] advised specifically what I intended to prove by this witness last week.

MR. WOLF: But I was not told what sources of information you intended to use.

BY MR. WOLF:

Q Perhaps, so I don't read all of the materials trying to find the relevant ones, perhaps you can show me what you used.

A Some of these right over here.

Q This is race and farm, non-farm residents, families, and non-resident individuals by total money income.

What does this mean?

A May I have it?

It indicates what is the income of the population based on—according to annual rates.

Q I see.

So this is for all families in the country?

A Correct. I assume the Virgin Islands would be the same thing.

Q This seems to me to indicate that 9.5 percent of all Negro families have incomes of over $15,000; is that correct?

A You are adding the figures down here. This is correct.

Q That's correct.

A Using the base you see over here. O.K., that's the base figures.

[365] Q All right.

So 9.5 percent of the Black families have incomes over $15,000?

A That's correct.

Q Are you at all familiar with the employment patterns in the Black community with regard to the number of wageearners that there are in the Black families?

A I didn't make any study, if that is what you ask me, no.

Q Are you familiar with the fact that the census will show that there are in Black families more often two wage-earners than in White families?

A I am aware of it.

Q That would tend to suggest that the number of jobs held by Black individuals earning $15,000 or over is somewhat less; is that right?

A That's correct; and that is shown in another table. I can't remember now, but when you used the statistics using only the Black males, then the percentage is lower.

Q You did testify, did you not, something about 2 percent and 4 percent?

A That's correct. That was done on a national basis.

Q Where did you find that in here?

A (The witness indicated.)

Q I see. This is males, male wageearners, by sex.

[366] Over $15,000 it is 1.4 percent in the Black community. This is farm and non-farm income; is that correct?

A The heading is on the table. I don't know which one you are looking at.

Yes, farm and non-farm labor.

Q Do you have any idea what the percentage of Blacks are who are involved in farm activity as opposed to Whites?

A No.

Q Is that disclosed here?

A Not on any table that I had. I am sure that you can find it. It's a question of digging.

Q Wouldn't that have some effect on that particular statistic?

A Not particularly, because you are going by the income. You establish how much a person or a family is earning, so if you are going by a family, yes; going by persons, no.

Q Persons, no? Does that add anything?
A I don't think so.

MR. WOLF: I wonder whether we could get the exact figures into the record. I think the best way to do this would be to mark these and introduce them.

Would that be all right?

Neither of us has copies, but I wonder if we could make this Plaintiffs' Exhibit 6, being "PAYROLL DATA ON CITY EMPLOYEES In Salary Ranges $15,000—$20,000," and offer it.

[367] Included on there is the percentage of those that they knew to be Black, so there is the possibility of some degree of error, but I think it is reasonably accurate.

(Two-page document entitled on the first sheet "PAYROLL DATA ON CITY EMPLOYEES In Salary Ranges $15,000—$20,000" was marked Plaintiffs' Exhibit P-6 for identification.)

MR. WOLF: And then P-7 will be "ANALYSIS OF TABLE 2 OF CURRENT POPULATION REPORTS—CONSUMER INCOME."

(Sheet entitled "ANALYSIS OF TABLE 2 OF CURRENT POPULATION REPORTS—CONSUMER INCOME" was marked Plaintiffs' Exhibit P-7 for identification.)

MR. WOLF: Thank you.

I have no further questions.

MR. MATTIONI: I have no questions.

THE COURT: Thank you very much.

DR. RICHARD CAPLAN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. MATTIONI: Dr. Richard Caplan resides at 1801 John F. Kennedy Boulevard, Philadelphia, Pennsylvania. He is a graduate of Ohio State University, the University of Cincinnati.

BY MR. MATTIONI:

Q Doctor, I think the shorter way is for you to read your own

* * *

PAYROLL DATA ON CITY EMPLOYEES

In Salary Ranges $15,000-$20,000

Categories	*Total Persons*	*No. of Blacks*	*Percentage of Blacks*	*Percentage of Whites*
*Civil Service Employees ($15,000 plus)	791	49	6.07	93.93
*Civil Service & Exempt Employees ($15,000 plus)	883	58	6.56	93.44
*Exempt Employees ($15,000 plus)	92	9	9.12	90.88
*Exempt Employees ($20,000 plus)	56	5	9.10	90.90
**Mayor's Appointments to Boards, Commissions, etc.	388	47	12.11	87.89

*The data presented herein is based upon the payroll data of the City of Philadelphia for the period ending August 29, 1971. Black persons were identified by members of the staff of the Commission on Human Relations.

If there is error, it is in the failure to identify persons as Black rather than identifying as Black persons who aren't.

**This data is based upon information admitted as true and obtained from lists from the Administrative Board of the City of Philadelphia with Black persons identified by members of the staff of the Commission on Human Relations.

Source: Department of Finance Payroll Section

ANALYSIS OF TABLE 2
OF CURRENT POPULATION REPORTS—CONSUMER INCOME
Series P-60, No. 79—July 27, 1971
(Household as of March, 1971)

Race of Head

Subject	*All Households in Thousands*	*Percentage Over $15,000*	*Households in Thousands*	*%*
Total	64,374	19.1	12,295	100.0
White	57,575	20.3	11,687	95.9
Black	6,180	8.2	506	4.1

Source: Series P-60, No. 79
Current Population Report

SUPREME COURT, U. S.
MAR 16 1973
MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

October Term, 1972

72-1264

No.——

THE MAYOR OF THE CITY OF PHILADELPHIA AND THE EDUCATIONAL NOMINATING PANEL OF THE CITY OF PHILADELPHIA,

Petitioners

v.

EDUCATIONAL EQUALITY LEAGUE, et al.,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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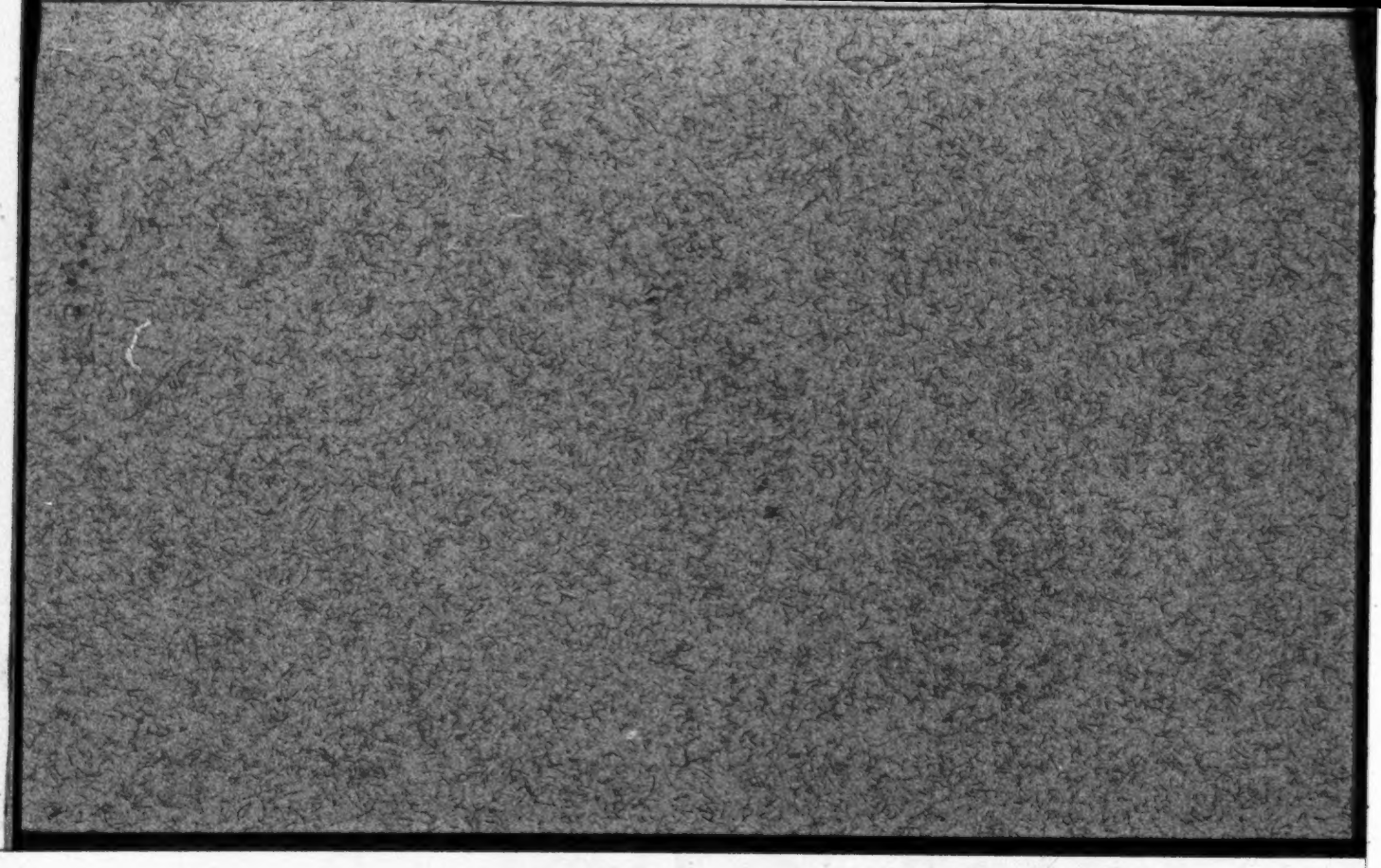

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IN THE

Supreme Court of the United States

October Term, 1972 No.——

THE MAYOR OF THE CITY OF PHILADELPHIA AND THE EDUCATIONAL NOMINATING PANEL OF THE CITY OF PHILADELPHIA,

Petitioners

v.

EDUCATIONAL EQUALITY LEAGUE, et al.,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

The Petitioners,[1] the Mayor of the City of Philadelphia and the Educational Nominating Panel, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 11, 1973, as modified on February 21, 1973, reversing the judgment of the United States District Court for the the Eastern District of Pennsylvania; finding that the former Mayor of the City of Philadelphia had discriminated on the basis of race in appointing to the Educational Nominating Panel; and requiring the present Mayor of the City of Philadelphia to

1. When the cause was adjudicated in the District Court the Mayor of the City of Philadelphia was the Honorable James H. J. Tate. However, since the first Monday in January 1972, the Honorable Frank L. Rizzo has been Mayor. Mayor Rizzo has never been made a party to this action.

submit evidence of his non-discrimination to the District Court on remand.[2]

OPINION BELOW

The opinion, as modified, of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion rendered by the United States District Court for the Eastern District of Pennsylvania is reported at 333 F. Supp. 1202 (E.D. Pa. 1971), and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on January 11, 1973. A timely petition for re-hearing and re-hearing en banc was denied on February 22, 1973, and this Petition for Certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether the Court of Appeals' reversal based on a finding of direct evidence of intent to discriminate on the basis of race on the part of the former Mayor of the City of Philadelphia violated the constraint of Rule 52(a) F. R. C. P., which limits reversals to clearly erroneous findings.

Whether evidence of statistical under-representation of black persons combined with an opportunity to discriminate is the appropriate formula to shift the burden of proof in this case:

---

2. Respondents, the Educational Equality League, Floyd L. Logan, W. Wilson Goode, Veronica Kellam, by her mother and next friend, Elizabeth Kellam, and Michael Green, by his father and next friend, Coolidge Green on behalf of themselves and all others similarly situated, moved for the "Declaration of a Class Action" which the District Court granted stating: "It is clear that a class consisting of all blacks in the City of Philadelphia meets all the requirements of Rule 23(a)."

(1) Where the chief elected official's discretionary appointment power is being reviewed by the Court;

(2) Where the qualifications for appointment are definite and limiting and have never been subjected to constitutional attack;

(3) Where, regardless of the executive's involvement and the limiting qualifications, the positions available are so small in absolute number as to make statistical underrepresentation inconclusive at best; and

(4) Where the unrebutted evidence discloses that under former Mayor Tate, minorities made very impressive advancements in all fields and at all levels of City government.

Whether the Court of Appeals was justified in fashioning its Order prospectively where the foundation of the holding was based on evidence of practices of former Mayor James H. J. Tate's administration and where absolutely no evidence exists that the present Mayor, not a party to the action, Frank L. Rizzo, has discriminated.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Article II:

> Section 2. The President . . . shall nominate and, by and with the advice and consent of the Senate, shall appoint . . . all other officers of the United States. . . . But the Congress may by law vest the appointment of such inferior officers, as they think proper in the President along. . . .

First Class City Public Education Home Rule Act of August 9, 1963, P.L. 643 [53 P.S. §13202 (Pocket Part 1972-73)]:

> **Article II, Section 2: Cities empowered.** Any city of the first class may frame and adopt charter provisions governing the administration of a separate and independent home rule school district. . . .

Philadelphia Home Rule Charter, Adopted by the Electors April 17, 1951:

Section 3-404. All other officers. Except as expressly otherwise provided in this charter, all appointed officers and all members and all officers of boards and commissions shall serve at the pleasure of the appointing power. . . .

Philadelphia Home Rule Charter, Educational Supplement, Adopted by the Electors, May 18, 1965:

ARTICLE XII
PUBLIC EDUCATION

CHAPTER 1
THE HOME RULE SCHOOL DISTRICT

Section 12-100. The Home Rule School District.

A separate and independent home rule school district is hereby established and created to be known as "The School District of Philadelphia."

Section 12-101. The New District to Take Over All Assets and Assume All Liabilities of the Predecessor School District.

The home rule school district shall

(a) succeed directly the now existing school district for all purposes, including, but not limited to, receipt of all grants, gifts, appropriations, subsidies or other payments;

(b) take over from the now existing school district all assets, property, real and personal, tangible and intangible, all easements and all evidences of ownership in part or in whole, and all records, and other evidences pertaining thereto; and

(c) assume all debt and other contractual obligations of the now existing school district, any long term debt to be issued, secured and retired in the manner now provided by law.

CHAPTER 2
THE BOARD OF EDUCATION

Section 12-200. The Board Created; Its Function.

There shall be a Board of Education of the School District of Philadelphia which shall be charged with the administration, management and operation of the home rule school district.

Section 12-201. Members of the Board; Method of Selection.

There shall be nine members of the Board of Education who shall be appointed by the Mayor from lists of names submitted to him by the Educational Nominating Panel, or, if enabling legislation is enacted by the General Assembly of the Commonwealth, elected on a non-partisan basis by the qualified voters of the city, all as more fully set forth in later sections of this Chapter.

Section 12-202. Eligibility for Board Membership.

Members of the Board of Education shall be registered voters of the City. No person shall be eligible to be appointed or elected to more than two full six-year terms.

Section 12-203. Terms of Board Members.

The terms of members of the Board of Education shall begin on the first Monday in December and shall be six years except that (1) of the first members of the Board appointed and if later there be an elective Board, of the first members elected, three shall be appointed or elected for terms of two years, three for terms of four years, and three for terms of six years, and (2) if the General Assembly enacts legislation permitting the election of members of the Board on a non-partisan basis, the terms of all appointed members shall expire on the first Monday of December immediately following the municipal election at which the first elective Board is elected.

Section 12-204. Removal of Members of the Board.

Members of the Board of Education may be removed as provided by law.

Section 12-205. Vacancies on the Board.

A vacancy in the office of member of the Board of Education shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died or resigned. If a member of the Board is removed from office, the resulting vacancy shall be filled as provided by law.

Section 12-206. Educational Nominating Panel; Method of Selection.

(a) The Mayor shall appoint an Educational Nominating Panel consisting of thirteen (13) members. Members of the Panel shall be registered voters of the City and shall serve for terms of two years from the dates of their appointment.

(b) Nine members of the Educational Nominating Panel shall be the highest ranking officers of City-wide organizations or institutions which are, respectively:

(1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,

(2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,

(3) a public school parent-teachers association,

(4) a community organization of citizens established for the purpose of improvement of public education,

(5) a federation, council, or other organization of non-partisan neighborhood or community associations,

(6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,

(7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,

(8) a degree-granting institution of higher education whose principal educational facilities are located wihin Philadelphia, and

(9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City.

(c) In order to represent adequately the entire community, the four other members of the Educational Nominating Panel shall be appointed by the Mayor from the citizenry at large.

(d) In the event no organization as described in one of the clauses (1) through (9) of subsection (b) exists within the City, or in the event there is no such organization any one of whose officers is a registered voter of the City, the Mayor shall appoint the highest ranking officer who is a registered voter of the City from another organization or institution which qualifies under another clause of the subsection.

(e) A vacancy in the office of member of the Educational Nominating Panel shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died, resigned, or was removed.

(f) The Educational Nominating Panel shall elect its own officers and adopt rules of procedure.

Section 12-207. The Educational Nominating Panel; Duties and Procedure.

(a) The Mayor shall appoint and convene the Educational Nominating Panel (1) not later than May twenty-

fifth of every odd-numbered year, and (2) whenever a vacancy occurs in the membership of the Board of Education.

(b) The Panel shall within forty (40) days submit to the Mayor three names of qualified persons for every place on the Board of Education which is to be filled. If the Mayor wishes an additional list of names, he shall so notify the Panel within twenty (20) days. Thereupon the Panel shall within thirty (30) days send to the Mayor an additional list of three qualified persons for each place to be filled. The Mayor shall within twenty (20) days make an appointment or, as provided in the following subsection, certify a nomination from either list for each place to be filled.

(c) If the General Assembly of the Commonwealth shall have previously enacted enabling legislation permitting members of the Board of Education to be elected on a non-partisan basis, not later than September fifteenth of the odd-numbered year in which the legislation was enacted or the ensuing odd-numbered year, the Mayor shall select nine names from either one or two lists of 27 names submitted by the Educational Nominating Panel according to the procedure set forth in subsection (b) and shall certify those nine names to the county board of elections as his nominations for members of the Board of Education. In certifying the names of his nominees to the county board of elections the Mayor shall designate three of his nominees as candidates for terms of two years, three for terms of four years and three for terms of six years. The ballots or ballot labels shall not contain any party designation for any of the candidates nominated by the Mayor, and under each name there will be a space permitting the voter to write in the name of any other person. In every instance the Mayor's candidate will be elected if, but only if, he receives more votes than any other candidate whose name is written in. In every subsequent odd-numbered year, three members of the Board shall be nominated by the Mayor from names submitted to him by the Educational Nominating Panel and elected in the same manner provided by this subsection,

and whenever a vacancy occurs the procedure for filling it shall be similar whether the vacancy be filled at a special election proclaimed by the Mayor or at a municipal election.

(d) The Educational Nominating Panel shall invite business, civic, professional, labor, and other organizations, as well as individuals, situated or resident within the City to submit for consideration by the Panel the names of persons qualified to serve as members of the Board of Education.

(e) Nothing herein provided shall preclude the Panel from recommending and the Mayor from appointing or nominating persons who have previously served on any board of public education other than the Board of Education created by these charter provisions.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. Section 1343 (3) alleging violation of 42 U.S.C. Section 1983. Specifically, the Educational Equality League alleges that the former Mayor of the City of Philadelphia discriminated on the basis of race in his appointments to the Educational Nominating Panel, in May of 1971.

The method of appointing persons to the Educational Nominating Panel is established by the Educational Supplement to the Philadelphia Home Rule Charter, approved by the electors on May 18, 1965, pursuant to the Act of August 9, 1963, P. L. 643, 53 P. S. Sections 13201-13223. The constitutionality of the Charter has not been questioned.

The Charter provides that during every odd-numbered year the Mayor shall appoint and convene a panel of 13 qualified persons to be called the Educational Nominating Panel ("Panel"). The function of this panel is to nominate three persons for each vacancy on the Board of Education of the School District of Philadelphia ("Board"). From the three persons (or six persons since, if the Mayor desires an *additional* three persons for each vacancy, he merely requests additional names), the Mayor selects and appoints a person to the vacancy on the Board. The Mayor's appointments to the Board have not been challenged, nor indeed, has the quality or dedication of the actual appointees been questioned.

The qualifications for appointment to the Panel vary. Four (4) Panel members must be from the "citizenry at large" "[i]n order to represent adequately the entire community. . . ." Charter, 12-206(c).[3] The remaining nine (9) panel members "shall be the highest ranking

3. The Mayor can, if he chooses on his own initiative, appoint from additional organizations of his own selection to fill these four "at large" positions.

officers of City-wide organizations or institutions. . . ." Charter, 12-206(b). These organizations are described with particularity as:

> (1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,
>
> (2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,
>
> (3) a public school parent-teachers association,
>
> (4) a community organization of citizens established for the purpose of improvement of public education,
>
> (5) a federation, council, or other organization of non-partisan neighborhood or community associations,
>
> (6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,
>
> (7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,
>
> (8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and
>
> (9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City.

Charter, 12-206(b) (1)-(9).

On May 25, 1971, Mayor Tate appointed and convened the Panel.

On August 6, 1971 the Educational Equality League sued Mayor Tate and the Panel alleging the Mayor made his appointments on racial criteria in violation of the Civil

Rights Act of 1866, 42 U.S.C. Section 1983 and requesting a speedy hearing, an injunction against the panel from acting, a judgment declaring that the Mayor discriminated on the basis of race and an order directing the Mayor to appoint a panel "fairly representative of the racial composition of the school community." Complaint, p. 8.

After expedited pre-trial discovery was completed a hearing was held on August 25 and September 7, 1971 before the Honorable Raymond Broderick, Judge of the United States District Court for the Eastern District of Pennsylvania.

At the hearing, the Educational Equality League attempted to offer evidence to support two theories: that the Mayor directly and personally discriminated against black persons when he appointed the Panel; and that the statistical evidence demonstrating the percentage of blacks in the general population of Philadelphia and the percentage of black students in the population of the School District of Philadelphia as compared with the percentage of blacks appointed to the thirteen member Panel creates a presumption of discrimination by the Mayor.

The Mayor and Panel offered evidence to support several theories of defense: that the appointments of the Mayor are protected from judicial interference by virtue of the executive's inherent discretion and the constitutionally mandated doctrine of separation of powers; that the Mayor's appointments satisfied the qualifications required by the Charter; that the qualifications required by the Charter vitiated the applicability of the Educational Equality League's statistical theory since more than mere citizenship and residency are required by the Charter to qualify for appointment to the Panel; and that the statistical theory is invalid as applied to the Panel since the Panel is so small that each individual change on the Panel results in extremely large changes in percentages. Finally, evidence established that the Mayor personally championed the expansion of opportunity for blacks in City employment as well as in appointed and elective political positions and

evidence was offered to contradict any assertion of personal discrimination as to the Mayor.

On November 8, 1973, the District Court issued its Findings of Facts, Conclusions of Law and Order, dismissing the complaint with prejudice. 333 F. Supp. 1202.

The District Court found inapplicable the "percentage rationale," i.e., the Educational Equality League's theory that a prima facie case or presumption of discrimination can be proved by comparing the percentage of blacks in the population of the City of Philadelphia with the percentage of blacks appointed to the 1971 Panel. 333 F. Supp. at 1207.

The District Court discussed but refused to find that the Mayor had discriminated on the basis of race in his appointments to the 1971 Panel.

The District Court did not reach the questions of executive discretion and separation of powers, although it expressed doubts as to its power to interfere with the discretion of an elected executive in his discretionary appointments. 333 F. Supp. at 1206.

The District Court did not reach or discuss the inapplicability of the percentage rationale in relation to the qualifications required by the Charter beyond citizenship and residency.

On November 9, 1971, the Educational Equality League filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit.

On December 5, 1972 argument on the briefs was heard by Judges Van Dusen, Gibbons and Hunter.

On January 11, 1973 the Court of Appeals issued its judgment vacating the judgment of the District Court except as to the Educational Nominating Panel, and remanding the cause to the District Court for further proceedings.

Timely Petitions for Rehearing were filed by each party, and a Petition for Rehearing En Banc was filed by the Mayor of the City of Philadelphia. All were denied, the Educational Equality League's on February 21, 1973 and the Mayor's on February 22, 1973.

On February 21, 1973 the Court of Appeals entered an order amending its order of January 11, 1973. The Court of Appeals found as a fact that the appointments by the Mayor to the Panel were not within the executive's discretion and that the selection process had a discriminatory effect. The Court of Appeals applied the percentage rationale holding that demonstrating under-representation and an opportunity for discrimination is all that is necessary to establish a prima facie case. Finally, the Court of Appeals found as a fact that the *former* Mayor had discriminated on the basis of race in his selections to the Panel and based on this finding, required the *present* Mayor to submit the bases for his executive judgments to the scrutiny of the District Court on remand.

These findings by the Court of Appeals were directly contrary to those made by the District Court. Furthermore, it failed to consider the evidence adduced that directly contradicted the witness relied upon by the Court of Appeals, and the evidence establishing that Mayor Tate had personally opened areas of opportunity to minorities that had previously been denied them.

The Mayor of the City of Philadelphia and the Educational Nominating Panel moved the Court of Appeals for a Stay of its Mandate pending Petition to the Supreme Court for a Writ of Certiorari. The Court of Appeals ordered its mandate stayed for 15 days with "no further extension. . . ." Order of United States Court of Appeals, March 2, 1973.

REASONS FOR GRANTING THE WRIT

Although ostensibly involving only one relatively insignificant panel appointed by the highest elected official of the City of Philadelphia, this case involves grave national consequences. As a direct result, and without precedent, the *present* Mayor of the City of Philadelphia, without even having been accused of racial discrimination, is required to submit his executive judgment to the District Court for the Eastern District of Pennsylvania regarding the selection of members of the Panel. The Mayor of the City of Philadelphia has the power of appointment to a broad variety of boards and commissions by virtue of statutes, Home Rule Charter, and Ordinance. Now, if and when racial percentage disparities appear, the Mayor will be subjected to the burden of *disproving* racial discrimination. Likewise, both statewide and nationally, the logical progeny of the holding of the United States Court of Appeals for the Third Circuit would require elected officials throughout the nation to defend and offer positive proof of their nondiscrimination in their executive appointments, whenever percentage disparities appear.

Perhaps, the most obvious situation is with the judiciary. If we assume a disproportionately small percentage of blacks in the Federal judiciary as compared to their proportion of the national population, this case would require the President of the United States substantiate by positive proof his nondiscrimination in his judicial appointments and further substantiate his proper consideration of blacks when making these appointments.

But, beyond the conclusions of law reached by the Court of Appeals there is one finding of fact of grave personal importance. The United States Court of Appeals for the Third Circuit found as a fact that the former Mayor of the City of Philadelphia James H. J. Tate, engaged in unlawful racial discrimination in his appointments to the Educational Nominating Panel. It held that his appointments to the Panel were "tainted." It held that there was

direct proof of the former Mayor's personal discrimination against black people.

Without attempting to portray former Mayor Tate as anything more than an astute politician, the record which Mayor Tate established over his decades of public service evidences a total commitment to the expansion of opportunities to minority groups, including black persons, at all levels of public service employment as well as in political appointments. The record in the District Court discloses an ever-increasing number of black persons employed at all levels of government service over the decade of former Mayor Tate's administration. And yet, as the result of the Court of Appeals opinion the final but critical and unfair judgment of Mayor Tate's Administration is that of discrimination against black persons on the basis of their race. The evidence of non-discriminatory public service was overwhelming. The evidence to the contrary was unsubstantial.

This Court should grant the Petition for this reason if for no other, for it is now the true Court of last resort. A finding of racial discrimination in the face of over-all employment of black people *exceeding* by nearly ten percent (10%) their proportion of the population of the City is hardly justified.

Finally, in terms of relief, the Court of Appeals has directed the District Court to apply the Appellate Court's Finding of Fact that Mayor Tate discriminated to the new Mayor, Frank L. Rizzo. There is no evidence in the record concerning the administration of Mayor Rizzo. The Court of Appeals has, nevertheless, ordered that Mayor Rizzo submit evidence to substantiate his nondiscrimination in appointments to the Educational Nominating Panel. Thus, not only has the Court of Appeals arbitrarily made Findings of Fact which the District Court could not have made, but it has now assumed that the finding of racial discrimination can in some way be transferred to another person who obviously could not have been a party to its first finding. Such a decision would, it seems, bind all future Mayors,

constituting an unlawful infringement of the constitutional scheme of government.

Point 1

In direct conflict with Rule 52(a) of the Federal Rules of Civil Procedure as well as numerous decisions of this Court, the Court below made findings of fact not only without finding clear error by the District Court but without any support on the record before it.

As has been discussed above, the Court of Appeals reversed the District Court on two bases.

The Educational Equality League had offered two theories in support of their cause of action. One involved indirect proof of discrimination by the so-called "percentage rationale." The other involved direct proof of discrimination on the part of the Mayor, the appointing authority.

In its Opinion and Order of November 8, 1971, the District Court discussed and reviewed the purported direct evidence of discrimination offered by the Educational Equality League. It rejected this testimony.

The Court of Appeals specifically reversed the Order of the District Court and made findings of fact unsupported in the record and without establishing clear error. It found that a number of black oriented organizations met the specifications of seven of the nine categories of Section 12-206(b) of the Charter (Court of Appeals, Opinion Page 6), and that one witness, Mr. W. Wilson Goode testified without contradiction or objection that the then Mayor had stated he would appoint no blacks to the *Board of Education* in addition to the two already on it (Court of Appeals, Opinion Page 6). The Court of Appeals found that Deputy Mayor Zecca was unaware of the existence of black oriented organizations which were within the requirements of Section 12-206(b) of the Charter (Court of Appeals, Opinion Page 6). Finally, the Court of Appeals found that the District Court had "overlooked" Goode's testimony about

the Mayor's statement referred to above (Court of Appeals, Opinion Page 7).

In fact, there is no evidence of qualifying black organizations existing in the categories required by the Charter. Goode testified but was contradicted by witnesses for the Mayor of the City of Philadelphia: Clarence Farmer, Chairman of the Philadelphia Human Relations Commission and Anthony P. Zecca, Deputy to the then Mayor James H. J. Tate. Goode testified that there were one or two organizations which had black leadership which satisfied the categories of the Charter. However, in his own testimony, the deficiencies of these organizations are made evident. For example, to satisfy the qualifications of Section 12-206(b)(1), Goode offered the United Negro Trade Union. His testimony was:

> Q. What does the United Negro Trade Unions represent?
>
> A. That represents all of the union officials who are black and who are in unions in Philadelphia. It is a kind of council of other officials of other black unions. (Goode, N.T. 4-5.)

It is apparent that the District Court refused to find that there were black organizations which qualified under the Charter because, by definition, an organization which is limited to black membership is not a City-wide organization. None of the organizations which are represented on the Educational Nominating Panel have membership which is exclusive or exclusionary. With the possible exception of the Urban League, the organizations referred to by Goode *excluded* non-black membership.

On the other hand, Zecca's testimony disclosed that the organizations selected satisfied precisely the requirements of the Charter. The fact that Zecca knew of no other organizations to qualify under 12-206(b) (1), proves nothing, other than that there may be no other such organization in the City of Philadelphia of such qualifications.

Furthermore, Zecca's testimony discloses the conscientious effort made to comply with the specific provisions of the Charter. In short, there is no evidence to substantiate the finding made by the Court of Appeals that there exists a number of black-oriented or black-lead organizations which meet the specifications of the Charter. The blacks on the Panel came from organizations that were black-lead, but which were not discriminatory in their membership.

The Court of Appeals improperly found that: "although the District Court made no finding on the subject, Mr. Goode testified, without contradiction or objection, that shortly before the 1969 panel was due to be appointed at a time when there was one vacancy for which the 1967 panel had not yet made its nominations, the Mayor stated that he would appoint no blacks to the Board of Education in addition to the two already on it." (Court of Appeals, Opinion Page 6).

Even if true, this statement was allegedly made with reference to the 1969 Panel and not the 1971 Panel. There is no testimony at all relating to the appointment of the 1971 *Panel* or *Board* appointments from its nominations.

This statement by Goode was, furthermore, clearly and directly contradicted by the testimony of Zecca. Zecca testified:

> Q. Mr. Zecca, we were discussing earlier a statement by Mayor Tate in 1969 that he would not appoint any additional Negroes to the School Board and you said you didn't recall that statement.
>
> A. I said I don't think he made such a statement.
>
> Q. Well all right.
>
> May I show you a very bad copy of the page of the Philadelphia Inquirer, Saturday, May 3, 1969, and the article says, "he indicated", referring to the Mayor, "he would not appoint another Negro to the Board because the Negro community has good representation in the two Negroes now serving on the Board."

* * *

Do you recall that article?

A. The witness: "I don't recall the article specifically but it doesn't say he is not going to name another member. It said that he indicated that he wouldn't name another member; and this is, of course, the reporter's version of this, but the quote said the Negro community has good representation in the two Negroes now serving on the Board.

They may have asked him whether he was going to appoint anymore Negroes to the Board and he said the Negro community has good representation on the Board as it is; just like it has excellent representation right in this story." (Zecca, N.T. 259-261)

In fact, the entire colloquy involves the Mayor's intention to appoint persons to the Board, and not the Panel. As has previously been stated the Educational Equality League has made no challenge to the appointments to the Board, but has limited its grievance to the appointments made to the Panel. Therefore, the testimony offered with regard to the Board is irrelevant. But beyond its irrelevancy, it is clearly contradicted by the testimony of Zecca which indicates that the statement may not have been made and if it was made may have been a misquote.

It was improper for the Court of Appeals to make a finding which the District Court refused to make based upon obvious hearsay which was contradicted by other proper evidence. This type of evidence, involving credibility and demeanor, is best left to the determination of a district court.

Also improper was the misstatement by the Court of Appeals of the District Court's Finding of Fact No. 17:

> The person assigned by the Mayor of Philadelphia to choose the groups under the enumerated categories Deputy Mayor Anthony Zecca, at the time of the hearing in the instant case was unaware of the existence of *many* of these black organizations. (Appendix, Page 6a) (Emphasis added.)

The Court of Appeals stated that:

> The District Court found that Deputy Mayor Zecca was unaware of the existence of black oriented organizations which were within the requirements of Section 12-206(b). (Court of Appeals, Opinion Page 6.)

The statement by the Court of Appeals is internally inconsistent in that black orientation is a requirement which is mutually exclusive of the requirement that organizations be Citywide in nature.

Rule 52 (a) of the Federal Rules of Civil Procedure prohibits a Court of Appeals from setting aside Findings of Fact made by a District Court unless those findings are clearly erroneous.

> Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Rule 52 F.R.C.P.

Rule 52 is particularly applicable to the situation in which the intention of a party is at issue. Here, Goode testified to the intention of the Mayor. As this Court said in *United States v. Yellow Cab Company:*

> Finding as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. . . . The trial court listened to and observed the officers who had made the records from which the government would draw an inference of guilt and concluded that they bear a different meaning from that for which the government contends.
>
> It ought to be unnecessary to say that Rule 52 applies to appeals by the government as well as to those by other litigants. There is no exception which permits it, even in an anti-trust case, to come to this

> Court for what virtually amounts to a trial de novo on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not "clearly erroneous."

United States v. Yellow Cab Company, 338 U.S. 338, 341-342 (1949).

So long as the Finding of Fact or failure to find a fact is substantiated on the record, the District Court's finding or failure to find may not be reversed. See also, 5 A Moore's Federal Practice Chapter 52.

The burden of proof remains upon the plaintiff even in civil rights cases. The conduct of the Court of Appeals in this case would assume that any statement by a person that another has discriminated, must be taken as true. This is not only legally improper, but also contrary to human experience.

Point 2

The decision below is in direct conflict with both Federal and Pennsylvania law regarding the appointing power of elected officials.

The second theory upon which the United States Court of Appeals based its reversal of the District Court's judgment is that of the percentage rationale. Construing the decisions of this Court in *Turner v. Fouche*, 396 U.S. 346 (1970) and *Alexander v. Louisiana*, 405 U.S. 625 (1972) the Court of Appeals held that to prevail under the percentage rationale a

> plaintiff need not show a deliberate practice of discrimination; a prima facie case is established by a demonstration that blacks were under represented and that there was an opportunity for racial discrimination. Opinion of the Court of Appeals, Page 10.

While this theory of proof has been applied to jury selection cases, voting registration cases and employment discrimination cases, it has never been applied to situations in which the discretion of a duly elected official in his appointing power has been in question. Indeed, there are a variety of reasons for not applying the percentage rationale to this and similar situations, the most fundamental of which is that principle of American political philosophy that requires the three branches of government to be separate and coequal and that no one branch should be the repository of ultimate power. This principle requires that the judicial branch be loath to interfere in areas of purely legislative or executive concern and likewise in areas of judicial concern the executive and legislative branches should not interfere. As the Pennsylvania Supreme Court recently stated:

> The line of separation or demarcation between the Executive, the Legislative and the Judicial, and their respective jurisdiction of powers, has never been definitely and specifically defined, and perhaps no clear line of distinction can ever be drawn.

Commonwealth ex rel. Carroll v. Tate et al., 442 Pa. 45, 51 (1971).

In *Carroll v. Tate, supra*, the issue involved a legislative encroachment on the judiciary. This case, of course, involves a judicial invasion of the executive. Great caution must be employed in this area, for as the Pennsylvania Supreme Court continued:

> The very genius of our tripartite government is based upon the proper exercise of their respective powers together with harmonious cooperation between

the three independent branches. *Commonwealth ex rel. Carroll v. Tate, et al., supra* 53.

Included in this Court's consideration of the issues here, must, therefore, be the constant consideration of the fundamental principles of American government. The United States Constitution in Article II, Section 2, places in the executive branch certain defined powers. These powers are given generally by and with the advice and consent of the Senate, however, the Constitution further provides:

> [B]ut the Congress may by law vest the appointment of such inferior officers, as they think proper in the President alone . . . U.S. Const. art. II, §2.

The landmark decision in *Marbury v. Madison*, 1 Cranch 135 (1803) presents an analogous situation on the national level. The importance of the President's discretion might be considered far greater than the Mayor's discretion. And yet, the difference is only one of quantity and not quality. For the prerogatives of the executive branch in a tripartite government are constant, and any court, as the representative of the judiciary, should not interfere in this area.

The facts of *Marbury* are so well known they need only be summarized here. Plaintiff was an appointee of the President and while the appointment had been made, it had not been delivered. Plaintiff sought an Order in Mandamus commanding the Secretary of State to deliver the appointment. In discussing the correctness of the remedy, the Court said:

> With respect to the officer to whom it would be directed, the intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders an illegal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation.

Marbury, supra 71.

But more importantly:

> Where the head of a department acts in a case in which executive discretion is to be exercised . . . it is again repeated, that any application to a Court to control, in any respect, his conduct would be rejected without hesitation.

Marbury, supra 71.

The first paragraph quoted above, speaks of the bases for the doctrine of judicial restraint in political questions, a policy argument. However, the second paragraph, states a principle of law which denies judicial interference in the area of executive discretion. Applied to the present litigation, *Marbury* stands for the proposition that lawful appointments within the discretion of the Mayor may not be disturbed except that once an irrevocable appointment is made a Court may order its ministerial execution. Although the complaint in the matter at hand does not directly ask for mandamus, the actual relief granted by the Court of Appeals requires the dissolution of appointments and new appointments made. These new appointments must more adequately represent the black population. This adequate representation can only be achieved by increasing the number of blacks on the Panel. Therefore, the present Mayor of the City of Philadelphia is required to appoint more blacks than at present to the Panel. The import of this decision of the Court below requires that the Mayor abandon his judgment and discretion and perform that purely executive function of appointing in an automatic and ministerial way. This or any similar limitation on the powers of the chief executive is totally impermissible and the District Court properly refused to entertain such an invasion of executive discretion, although it did not reach the issue. As this Court said in *Keim v. United States*, 177 U.S. 289 (1899):

> The appointment to an official position in the government, even if it be simply a clerical position, is not a mere ministerial act but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore, it is one of those acts over which the Courts have no general supervising power.

The particular reasons for the executive's discretion in this case are readily discernible in the record and are in keeping with the theme of the entire Home Rule Charter, the organic law of the City of Philadelphia. That theme or theory of government is to place in the hands of the executive the responsibility for his actions. It is obvious that only if the Mayor has the right to choose will the responsibility for the choice be his.

The general principle of law mandated by the doctrine of separation of powers requires that the judiciary not interfere in the executive's discretionary appointments; and the organic law of the City of Philadelphia, the Philadelphia Home Rule Charter, and the general law of the Commonwealth of Pennsylvania requires non-interference in such appointments as well. Subject to those specifically provided for qualifications, all appointees to boards and commissions under the Home Rule Charter are appointed and serve at the pleasure of the Mayor. Section 3-404 of the Home Rule Charter provides as follows:

> All other officers. Except as expressly otherwise provided in this Charter, all appointed officers and all members and all officers of boards and commissions shall serve at the pleasure of the appointing power and until their successors are qualified.

The Charter's statement on the law is consistent with that of the Commonwealth. In *Commonwealth ex rel. Specter v. Vignola*, 446 Pa. 1 (1971) the Supreme Court of Pennsylvania held that:

> Appointed public officers are removable from office at the pleasure of the appointing power. . . .

Commonwealth ex rel. Specter v. Vignola, supra. Accord, *Naef v. Allentown*, 424 Pa. 597 (1967); *Philadelphia v. Sacks*, 418 Pa. 193 (1965); *Schluraff v. Rzymek*, 417 Pa. 144 (1965).

Absent proof of actual discrimination by the Mayor, there can be absolutely no justification for the Court of Appeals' opinion. The record clearly refutes any discrimination in these specific appointments.

The Petition should, therefore, be granted.

Point 3

The Court below was unjustified in requiring that the present Mayor, the Honorable Frank L. Rizzo, submit "evidence that the organizations in the black community which qualify have received proper consideration" in making his appointments to the Panel.

The present suit was brought against James H. J. Tate. At no time was evidence produced regarding the administration of Frank L. Rizzo, Tate's successor in office. Mayor Rizzo had not yet assumed office. In fact the decision of the District Court was made prior to Mayor Rizzo's election. Therefore, there could be no evidence whatsoever regarding the practices of the present Mayor, Frank L. Rizzo, before the United States Court of Appeals for the Third Circuit. And yet, anomalously, the Court of Appeals ordered the staff of Mayor Rizzo to submit to the District Court evidence of non-discrimination in appointments to the Panel.

Footnote 21 of the Court of Appeals' decision suggests the rationale for this direction to the District Court.

> "21. Mayor Tate has been succeeded by the Honorable Frank L. Rizzo and the present case has, of course, involved *no showing that Mayor Rizzo has in any way discriminated against blacks.* Nevertheless,

on this record, Mr. Zecca continues as a Deputy Mayor and since this Court finds that plaintifff has shown on this record discrimination in regard to the present panel, the Federal Courts must assure that the appointment of the 1973 panel is free from taint. *Cf. Conover v. Montemuro*, —— F. 2d —— (1972) (3rd Cir. No. 71-1871, filed December 20, at page 13)" (Court of Appeals, Opinion page 12.) (Emphasis added.)

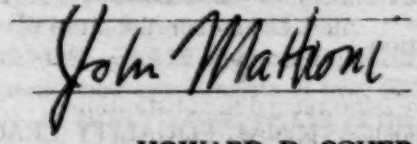
There is no record to substantiate the assumption that Mr. Zecca has today any responsibility for appointments to the Panel. Zecca is Deputy to Mayor Rizzo. Under Mayor Tate he was alone in this position. However, under the present Mayor, Philip R. T. Carroll is the Mayor's immediate subordinate and it is he who oversees the Mayor's office. Zecca, as Deputy to the Mayor, shares this title with Michael Wallace, Esquire. In addition, there are now three assistants to the Mayor. Based on the change in personnel, it would be equally reasonable to assume that the entire nomination process for membership or appointments to Boards and Commissions has been considerably altered. Although there is no evidence bearing on the subject, the fact is that the procedure for filling such positions has been completely revised.

Even if Mayor Tate can properly be found to have practiced personal discrimination, there is no justification on this record to assume or even suspect, that Mayor Rizzo would act in a similar manner. Therefore, the direction to the Court below to enjoin the present Mayor from discrimination is both unwarranted and unjustified. The selection process with respect to the Panel had been challenged only as it involved the then Mayor Tate. While systematic exclusion remains unlawful, there was and is no such allegation as to the present administration.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,



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APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action — No. 71-1938

EDUCATIONAL EQUALITY LEAGUE, et al.

v.

HONORABLE JAMES H. J. TATE, et al.

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

Broderick, J. — **November 8, 1971**

This class action was brought by the Educational Equality League and certain named individuals on behalf of themselves and all other similarly situated in Philadelphia, seeking injunctive and other relief to prohibit the defendant, Mayor of Philadelphia, James H. J. Tate, from continuing his alleged racial discrimination in making appointments to the Educational Nominating Panel, which nominates members to the Philadelphia School Board.

After a hearing on the merits on August 25th and September 7, 1971, and a complete study of the applicable law and the briefs of the parties, we make the following:

FINDINGS OF FACT

1. It is stipulated that the population of the City of Philadelphia is 1,948,609, of whom 653,791 are black.

2. In the 1970-1971 school year, the public school population of the City of Philadelphia was 60.5% black.

3. In the 1970-1971 school year, the public elementary school population of Philadelphia was 60.2% black.

4. In the 1970-1971 school year, the public junior high school and middle school population of Philadelphia was 65% black.

5. In the 1970-1971 school year, the public senior high school population of Philadelphia was 56.2% black.

6. In the 1970-1971 school year, the public vocational school population of Philadelphia was 59.9%.

7. In 1968-69, 42%, or 116 of the 279 schools in the public school systems, had enrollments of over 95% black or over 95% white; in 1970-71, 49%, or 139, of the schools had over 95% one-race enrollments.

8. In 1968-69, 90,105 black students, 54.1% of said students, were in schools with over 95% black enrollment; in 1970-71 the number had increased to 96,014, or 56.7%.

9. The Educational Nominating Panel was set up by the Educational Supplement to the Home Rule Charter, for the purpose of screening applications for school board appointments and nominating three individuals for each vacancy on the School Board for the Mayor's consideration.

10. The Educational Nominating Panel consits of 13 members, 9 of whom are appointed to fulfill certain classifications set out in the Section 12-206 of the Educational Supplement and four (4) are at-large appointments.

11. In 1965 the first panel was appointed with ten (10) white and three (3) black members.

12. In 1967 the second panel was appointed with eleven (11) white and two (2) black members.

13. In 1969 the third panel was appointed with twelve (12) white and one (1) black members.

14. In 1971 the fourth panel was appointed with eleven (11) white and two (2) black members.

15. The first list of nominees submitted to the Mayor in 1971 consisted of five (5) whites and four (4) blacks for the three (3) vacancies on the school board.

16. There are several organizations reflecting the views and participation of the black community which could qualify under subsections 1, 2, 3, 4, 5, 6 and 9 of Section 12-206(b). (7 of the 9 enumerated classes.)

17. The person assigned by the Mayor of Philadelphia to choose the groups under the enumerated categories, Deputy Mayor Anthony Zecca, at the time of the hearing in the instant case was unaware of the existence of many of these black organizations.

18. Of fifty-six appointments to non-civil service positions with salaries in excess of $20,000 who are presently serving, five of these, or 9% of the total, were black.

19. The Mayor has made three hundred eighty eight (388) appointments to Boards, Authorities and Commissions, who are presently serving, of whom forty-seven (47) or twelve (12) percent were black.

20. The Board of Education has two (2) blacks of the total membership of nine (9), or twenty-two (22) percent.

21. Although the Charter provides that the chief executive of the organizations enumerated in §12-206(b) of the Educational Supplement be appointed to the panel, persons other than chief executives have been appointed.

DISCUSSION

Plaintiffs brought this class action under 42 U.S.C. §1983 seeking declaratory and injunctive relief to end alleged racial discrimination in the appointment of members to the Educational Nominating Panel pursuant to the provisions of the Educational Supplement of the Philadelphia Home Rule Charter (hereinafter referred to as the Educational Supplement). More specifically, plaintiffs allege violations of the Equal Protection Clause of the Fourteenth Amendment, the Pennsylvania Human Relations Act, and the express provisions and intended purpose of the Educational Supplement, in that Mayor Tate systematically excluded Negroes from said Educational Nominating Panel.

Preliminary to reaching the merits of plaintiffs' claim, we must first ascertain whether plaintiffs should be certified as a class pursuant to Rule 23 of the Federal Rules

of Civil Procedure. It is clear that a class consisting of all blacks in the City of Philadelphia meets all the requirements of Rule 23(a) in that: "(1) the class is so numerous that joinder of all members is impracticable"; (2) there is a complete identity on all issues of law and facts; (3) the claims of the representative parties are identical to other members of the class; and (4) there is competent representation by the parties bringing the suit. Moreover, the class clearly falls within the purview of Rule 23(b)(2), because it alleges that defendant has acted on grounds which affect all members of the class. Therefore, it is clear that the class must be confirmed.

The Educational Nominating Panel is a thirteen-member body appointed by the Mayor to screen applicants for membership on the school board and nominate three candidates for each current vacancy on the school board (Section 12-207(b) of the Educational Supplement). Nine (9) members of said Panel are required by Section 12-206(b) of the Educational Supplement to be the highest ranking officer of an enumerated city-wide organization or institution described in detail in that section with the remaining four (4) appointees chosen by the Mayor from the citizenry at large to ensure adequate representation of the entire community (Section 12-206(c)).

In deciding whether, in fact, racial discrimination was practiced in Mayor Tate's nominations to the panel plaintiffs ask us to hold that a prima facie case of discrimination can be made out by a mere showing that blacks comprise a substantial portion of the population, that some blacks are qualified to serve, and that few if any blacks have served in the past. In urging this result plaintiffs rely on cases such as *Hernandez v. Texas*, 374 U.S. 475 (1954), *United States v. Greenwood Municipal Separate School System*, 406 F.2d 1086 (5th Cir. 1969), and *Alabama v. United States*, 304 F.2d 583 (5th Cir.), *aff'd*, 371 U.S. 37 (1962). This Court recognizes that this general rule has been applied in certain types of cases. As was clearly stated by the Fifth Circuit in *United States v. Jefferson County Board of Education*, 372

F.2d 836 (5th Cir. 1966); *aff'd* on rehearing *en banc*, 380 F.2d 383 (5th Cir. 1967), *cert. denied sub nom., Board of Education of the City of Bessemer v. United States*, 389 U.S. 840 (1967):

> This Court has frequently relied on percentages in jury exclusion cases. Where the percentage of Negroes on the jury and jury venires is disproportionately low, compared with the Negro population of a county, a prima facie case is made for deliberate discrimination against Negroes. Percentages have been used in other civil rights cases. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white children in public schools. *Id.* at 887.

However, this rule has been confined to voting rights, employment, school desegregation and jury cases. *E.g., Norris v. Alabama*, 294 U.S. 587 (1935) (Juries); *Alabama v. United States, supra* (voting); *United States v. Greenwood Municipal Separate School District, supra (schools); United States v. Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969) (employment).[1] No case has been called to our attention in which this rule has been applied to an elected chief executive in the exercise of his discretionary

1. One case, *Turner v. Fouche, supra*, has applied the percentage rationale to a school board. However, that case is clearly distinguishable from the instant case. In *Turner* the body which appointed the school board was a grand jury, which should have been constituted from all eligible members of the community. The absence of an appropriate number of blacks on the grand jury raised the presumption of discrimination. Thus, in essence, *Turner* was a grand jury case. In the instant case, 9 of the appointments were limited by law and all citizens are not eligible. Moreover, unlike the situation in *Turner*, the Educational Nominating Panel does not have the authority to appoint Board members but rather only has the authority to submit names to the Mayor. Thus, *Turner* is not controlling in this case.

appointive power. We do have reservations as to whether the Courts have the authority to exercise control over the chief executive in such circumstances; however, we need not decide this question since the facts presented in the instant case render use of this test unfeasible.

It is undisputed that sixty (60) percent of the Philadelphia Public School population and thirty-three (33) percent of the Philadelphia population is black. Plaintiffs contend that the 60% figure should be used in determining whether there has been discrimination in appointments to the panel. With this reasoning, we do not concur. The standard when using a percentage rationale to establish a prima facie case of discrimination has always been the number of blacks qualified to fill the jobs in which the alleged discrimination is taking place. *E.g., Turner v. Fouche*, 396 U.S. 346 (1970); *Hernandez v. Texas, supra.* In the instant case that figure would depend on the *adult population* of Philadelphia, which is approximately 33%.

Mayor Tate's appointments to the Panel include two blacks out of the thirteen appointees, or approximately fifteen point four (15.4) percent of the panel. In its six-year history, the panel has had from 1 to 3 blacks (8% to 23%). With only thirteen members on the Educational Nominating Panel, the addition or subtraction of one member of any ethnic or racial group results in a change of eight (8) percent in that group's representation. In this Court's opinion, such wide fluctuations based on small numerical changes in membership on the Panel result from the limited size of the Panel and render such statistics meaningless as an indicator of racial discrimination. Furthermore, in the cases wherein the percentage rationale has been adopted, there were a large number of blacks within the population eligible for a large number of positions. This is not the situation in the instant case where a small board is involved, and we cannot find that the absence of additional blacks from a thirteen-member panel proves discrimination.

Plaintiffs rely heavily on the fact that only 8.9% (5 of 56) of Mayor Tate's appointments for positions with

salaries in excess of $20,000 have been black. Plaintiffs admit that this fact has no direct bearing on the issues before us, but state that it is relevant to show a pattern of discrimination. However, no case has been presented to us, nor does our research disclose any case, in which a percentage rationale has been used to prove job discrimination without a finding that those allegedly being excluded could qualify for those jobs in roughly the same ratio as they appear in the population. Since no evidence was presented, we cannot assume the percentage who could qualify for such positions. Therefore, the aforesaid statistic is not meaningful, and we do not have to determine whether it is relevant in making a determination on the issue of racial discrimination.

Since the facts of the instant case do not lend themselves to the percentage rationale, plaintiffs must show discrimination by direct proof. The only direct proof offered by the plaintiffs was a newspaper article allegedly quoting Mayor Tate to the effect that he would not appoint any more blacks to the Board of Education. However, since said newspaper article is inadmissible hearsay, there is [no direct proof of discrimination in this record.]

Further, plaintiffs would have us construe Section 12-206(c) of the Educational Supplement to hold that the phrase "representative of the community" refers to racial balance. However, the interpretation of this statute would more properly be decided by the State courts, and we take no position thereto. Similarly, while it is clear that the Mayor has not appointed the chief executive officer of the various organizations selected for representation on the Panel as required by the Educational Supplement, such violations have no bearing on the charges of racial discrimination and should also be decided by the State courts.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this case under 28 U.S.C. 1343 (3).

2. This action is properly maintainable as a class action on behalf of black students and parents, on behalf of black organizations which qualify for membership on the Educational Nominating Panel, and on behalf of all black citizens of Philadelphia.

3. The fact that there have been alleged violations of the Charter in appointments to the Educational Nominating Panel, such as the failure to appoint chief executives of organizations to the Panel and failing to appoint at-large members to adequately represent the entire community, are not relevant in determining whether racial discrimination was involved with the appointments and such issues should be litigated in the State courts.

4. In the context of the facts found by this Court, the percentage rationale cannot be used to establish a prima facie case of racial discrimination by defendant in violation of the Fourteenth Amendment in the appointment of members to the Educational Nominating Panel.

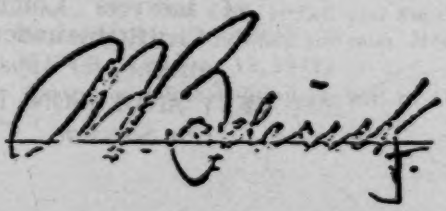
5. The plaintiffs failed to prove that the Educational Nominating Panel was appointed in violation of the Fourteenth Amendment to the Constitution of the United States.

6. Plaintiffs' complaint is, therefore, dismissed with prejudice.

Accordingly, the following Order is entered:

ORDER

AND NOW, to wit, this 8th day of November 1971, it is hereby ORDERED AND DECREED that the complaint in the above-captioned matter is dismissed with prejudice.



UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2042

EDUCATIONAL EQUALITY LEAGUE, FLOYD L. LOGAN, W. WILSON GOODE, VERONICA KELLAM, by her mother and next friend, ELIZABETH KELLAM, and MICHAEL GREEN, by his father and next friend, COOLIDGE GREEN on behalf of themselves and all others similarly situated

Appellants

v.

HONORABLE JAMES H. J. TATE, Mayor of the City of Philadelphia, and THE EDUCATIONAL NOMINATING PANEL

(D. C. Civil Action No. 71-1938)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 5, 1972

Before VAN DUSEN, GIBBONS and HUNTER,
Circuit Judges

EDWIN D. WOLF, ESQ.
of Lawyers' Committee
for Civil Rights under Law,
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OPINION OF THE COURT

(Filed January 11, 1973)

VAN DUSEN, *Circuit Judge*.

Plaintiffs instituted their class action under 42 U.S.C. §1983 (1970) in August 1971 against the Honorable James H. J. Tate ("Mayor"), then Mayor of Philadelphia, and the Educational Nominating Panel ("Panel").[1] They alleged that the Panel had been appointed in a racially discriminatory manner. After considering the stipulated facts and the testimony and exhibits both sides introduced, the district court entered an order on November 8, 1971, dismissing the action.[2] From that order plaintiffs appeal. This court has reviewed the applicable law, which now includes two significant cases decided after the district court order,[3] and has concluded that it is compelled to vacate the district court order and to direct the district court to grant appropriate relief.[4]

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1. Although defendants did not question the propriety of suing the Panel under §1983, it would appear that the Panel is not a "person" under this section and thus not liable to such a suit. See *United States ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84 (3d Cir. 1969). Consequently, the district court was correct in dismissing plaintiffs' complaint as to the Panel.

2. The district court opinion in support of this order is reported at 333 F. Supp. 1202 (E.D. Pa. 1971).

3. *Alexander v. Louisiana*, 405 U.S. 625 (1972); and *Smith v. Yeager*, 465 F.2d 272 (3d Cir. 1972), *cert. denied sub nom. New Jersey v. Smith*, 41 U.S.L.W. 3341 (U.S., Dec. 18, 1972).

4. The dismissal in favor of the Panel, however, will be affirmed. See note 1, *supra*.

The Educational Supplement of the Philadelphia Home Rule Charter (Educational Supplement) provides that the mayor appoint the members of the Board of Education. The function of the Panel is to submit to the mayor the names of persons best qualified to serve on the Board. The Panel nominates three persons for each place on the Board to be filled, and an additional three persons if the mayor requests such additional names. The mayor must choose solely from these nominees. See section 12-207(b) of Educational Supplement. The Panel, which has thirteen members, is itself chosen by the mayor. Nine members must be the highest ranking officers of specified types of city-wide organizations, and four are chosen at large.[5] Each Panel serves two years, commencing at or before May 25 of odd-numbered years.

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5. Section 12-206(a)-(b) provides:

"(a) The Mayor shall appoint an Educational Nominating Panel consisting of thirteen (13) members. Members of the Panel shall be registered voters of the City and shall serve for terms of two years from the dates of their appointment.

"(b) Nine members of the Educational Nominating Panel shall be the highest ranking officers of City-wide organizations or institutions which are, respectively:

"(1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,

"(2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,

"(3) a public school parent-teachers association,

"(4) a community organization of citizens established for the purpose of improvement of public education,

"(5) a federation, council, or other organization of non-partisan neighborhood or community associations,

"(6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,

"(7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,

The Chairman of the Educational Home Rule Charter Commission, which drafted the Educational Supplement, contemplated that the composition of the Panel would "constitute a balanced representation or cross-section of the people of the entire community—all of the community's ethnic, racial, economic, or geographic element and segments."[6] The rationale of the Panel-Mayor-Board arrangement was explained as follows:[7]

> "Selection of the School Board is the key feature of the Charter Supplement. The concept is that the Mayor, as the Chief Executive of the City, elected by and accountable to the entire electorate and community, is the appropriate 'appointing authority' for the School Board. As such, the Mayor is permitted sufficient discretion in School Board selection to preserve such accountability. On the other hand, the Panel is a mechanism for dignified recruitment and screening of top-caliber candidates for the important community post of School Board member.
>
> "The Panel would play a crucial role in selection. It would be constituted and composed in a manner that safeguards the Mayor's accountability, that produces representativeness of the entire community, and that assures responsiveness to community change and development over the years.
>
> "The Panel would perform a governmental role in helping to select a School Board which administers the public school system and the public funds required

---

Note 5—*Continued*

> "(8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and
>
> "(9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City."

6. Exhibit D-7, reproduced at App. 15a.
7. Suppl. App. 4a-5a.

to finance it. Therefore, it is proper to restrict Panel membership to residents of the City; yet, its composition will permit the Mayor to select members who are dedicated to the improvement of the larger regional community and whose perspective encompasses the state-wide and national implications of the public education task.

"While the Mayor would be required to select nine members of the Panel from among the principal officers of City-wide organizations, he could select more or all thirteen members from such categories if he wishes. However, through the four at-large memberships, distinguished citizens would not be precluded from serving on the Panel merely because they are not officially identified with a particular community organization at a particular time.

"By specifying categories, rather than particular organizations, in the Charter, the Proposals recognize that community organizations and civic agencies change with time, and that over a period of years there can be wide representation of the many dedicated community groups and civic agencies in our City.

"The Supplement requires the Panel to solicit nominations from all community elements and agencies, study the qualifications of nominees, screen and select nominees, and make recommendations to the Mayor."

This legislative history serves as the background for the facts of which plaintiffs complain. The first Panel, appointed in 1965, had ten white and three black members. The white-black ratios of the 1967, 1969, and 1971 Panels were, respectively, eleven and two, twelve and one, and eleven and two.[8] At the time the 1971 Panel was being

8. Apparently the appointment of one of the two blacks on the 1971 Panel occurred because, after a qualifying city-wide organization had been selected but before its president could be appointed to the Panel, the white president was succeeded by a black.

appointed, blacks constituted about 33.5% of the population of Philadelphia and a much greater percentage, 60%, of the students in the public school system. A number of black-oriented organizations met the specifications of seven of the nine categories of section 12-206(b).

The Mayor not testifying, the only evidence relating to the inner workings of the Mayor's appointment machinery came from W. Wilson Goode, one of the plaintiffs, and from Deputy Mayor Anthony Zecca, the person responsible for recommending to the Mayor organizations which met the requirements of section 12-206(b). Although the district court made no finding on the subject, Mr. Goode testified, without contradiction or objection, that shortly before the 1969 Panel was due to be appointed at a time when there was one vacancy for which the 1967 Panel had not yet made nominations, the Mayor stated that he would appoint no blacks to the Board of Education in addition to the two already on it.[9] Mr. Goode also accused the Mayor of not reappointing to the 1969 Panel organizations which served on the 1967 Panel because of dissatisfaction with the 1967 Panel's having included so many blacks among its nominees.[10]

Deputy Mayor Zecca testified that he had no knowledge of the use of racial criteria in the appointment process,[11] but was unable to recall why the 1967-1969 changes had been made.[12] The district court found that Deputy Mayor Zecca was unaware of the existence of black-oriented organizations which were within the requirements of section 12-206(b).[13]

---

9. N.T. 14-17 of Document 14 (E.D. Pa., Civil No. 71-1938). If the Mayor decided, prior to receiving nominees from the Panel, to exclude black nominees from consideration, an inference may be drawn that the Mayor in similar manner excluded blacks from consideration as members of the 1971 Panel.

10. *Id.*

11. N.T. 212.

12. N.T. 222.

13. See Finding of Fact 17 at p. 1204 of 333 F. Supp. For example, Deputy Mayor Zecca apparently thought that only the

Assessing all the evidence, the district court ruled that the reasoning of *Turner v. Fouche*, 396 U.S. 346 (1970), where the Supreme Court held that plaintiffs had established a prima facie case of discrimination, did not apply to the present situation. Nevertheless, the court examined this situation as if *Turner v. Fouche* were controlling and concluded that on these facts plaintiffs had not made out a prima facie case. The low percentage of blacks on the Panel was meaningless, the court decided, because the Panel's small size invalidated comparisons between the racial composition of its membership and that of the population of Philadelphia. The court also rejected as unpersuasive various statistics regarding the Mayor's record in appointing blacks to other positions in the city government.[14]

Having thus found no indirect evidence of discrimination, the district court went on to hold that plaintiffs had not established a direct case of discrimination, either, overlooking Mr. Goode's testimony about the Mayor's statement referred to earlier in this opinion.[15] The court apparently

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AFL-CIO and the Greater Philadelphia Chamber of Commerce fit the specifications, respectively, of section 12-206(b)(1) and (2). *See* N.T. 248-52. According to the testimony of Mr. Goode, the United Negro Trade Unions would qualify under section 12-206(b)-(1) and both the Greater Philadelphia Community Development Corporation and the Greater Philadelphia Enterprise Development Corporation, among others, under section 12-206(b)(2). N.T. 4-5 of Document 14 (E.D. Pa., Civil No. 71-1938). The highest ranking officers of these three organizations are black.

Despite Deputy Mayor Zecca's good faith, his failure to familiarize himself with these eligible organizations would, given his important position in the selection process, support an inference that the selection process had a discriminatory effect.

14. Because of our conclusion, it is unnecessary to discuss whether the district court erred in evaluating these sets of data.

15. In view of the result reached on plaintiffs' federal claims, the district court declined to exercise pendent jurisdiction over plaintiffs' claim that the Mayor had also violated state law—namely, various provisions of the Educational Supplement—in selecting Panel members.

concluded that the Deputy Mayor's ignorance of black-oriented organizations did not amount to discrimination against blacks.

It should be noted at the outset that plaintiffs are not seeking to establish any sort of racial quota for membership on the Panel. No group can demand "as a matter of substantive constitutional right, any particular degree of racial balance or mixing. . . ." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24 (1971). Plaintiffs ask only that the Mayor of Philadelphia not exclude blacks from proper consideration when making appointments to the Panel. Almost a century ago the Supreme Court articulated the rationale of the Fourteenth Amendment:[16]

> "It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

Such is still the law. As the Supreme Court said in *Turner v. Fouche*, 396 U.S. 346, 362 (1970), "the appellants and the

16. *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880).

members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications."

Defendants attempt to distinguish *Turner v. Fouche* on two grounds. First, they suggest that it was significant in *Turner v. Fouche* that the instrument for selecting the members of the School Board was a grand jury, which grand jury was alleged to have been chosen in a discriminatory manner. In other words, defendants argue that the Fourteenth Amendment applies more forcefully to grand juries than to some other public body such as the Panel here, even though the Panel plays a role in the Philadelphia school system analogous to the grand jury in *Turner v. Fouche*. The answer to this argument is that there is no place for discrimination anywhere in the public school system. *See Brown v. Board of Education*, 347 U.S. 483, 493-95 (1954). Secondly, defendants reason that a member of the executive must have considerable discretion in the choice of his personal staff and that the Fourteenth Amendment should not be interpreted to restrain the exercise of this discretion. It is unnecessary for this court to decide whether the Fourteenth Amendment is limited in this way, because it is clear from the language of the Educational Supplement and from the legislative history quoted earlier that the Panel was not intended to operate as part of the staff of the Mayor.

Having determined that discrimination in the appointment of the Panel was impermissible, we turn to the question of whether the plaintiffs succeeded in proving that there in fact was discrimination against blacks.

In holding in favor of the plaintiffs in *Turner v. Fouche*, the Supreme Court relied on three factors: the substantial difference between the proportion of blacks on the list from which the grand jury was chosen (37%) and in the general population (60%); the elimination of 171 blacks out of the 178 persons found to lack "intelligence" or "uprightness;" and the failure of the jury commissioners to familiarize themselves with the black community. In

Alexander v. Louisiana, 405 U.S. 625, 630 (1972), the Court pointed out that the various steps taken in the selection process resulted in the "progressive decimation of potential Negro grand jurors" and that "[t]he racial designation on both the questionnaire and the information card provided a clear and easy opportunity for racial discrimination." This court recently reviewed *Turner v. Fouche* and *Alexander v. Louisiana* and held that to prevail a plaintiff need not show a deliberate practice of discrimination; a prima facie case is established by a demonstration that blacks were under-represented and that there was an opportunity for racial discrimination. *Smith v. Yeager*, 465 F.2d 272, 278-79 (3d Cir. 1972), *cert. denied sub nom. New Jersey v. Smith*, 41 U.S.L.W. 3341 (U.S., Dec. 18, 1972). We also found that ignorance on the part of a jury commissioner had considerable importance. *Id.* at 277.

In the present case the opportunity for discrimination cannot be denied. Unfortunately, the parties did not introduce the expert testimony of a statistician on whether the frequency of black appointments to the 13-member Panel fell outside the range to be expected were race not a factor. However, the small proportion of blacks on the Panel is significant in light of the racial composition of the public schools, which are about 60% black. Because one qualification for Panel membership is interest in the public school system and because the parents of school children are likely to have this interest, a colorblind method of selection might be expected to produce that many more black Panel members. Thus, properly considered, the small proportion of blacks on the Panel points toward the possibility of discrimination. This implication is consistent with the inferences to be drawn from the testimony on the Mayor's Panel and Board selection processes.[16a]

We have carefully gone over the record and have concluded that it made out a prima facie case of discrimination under the above-cited cases. Although on notice of the potential need to present evidence to rebut such prima

16a. *See* notes 9 and 13 above.

facie case evidence,[17] defendants did not offer any reasonable explanations. The only testimony relevant to such explanations was that of Deputy Mayor Zecca,[18] and "affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972); see also *Turner v. Fouche, supra* at 361; *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715, 725 (1961).[19] Accordingly, the defendants failed on this record to rebut the prima facie case as a matter of law.

It will be the district court's function to determine the precise nature of the relief to which plaintiffs are entitled. Plaintiffs have limited their complaints to the method of selection of Panel members; they have in no way challenged the operation of the Panel, that is, the confirmed nominations the Panel has made.[20] Consequently, we hold that the district court should issue a declaration that the selection of the members of the 1971 Panel has violated the Fourteenth Amendment and an injunction restraining the Mayor and his successors from considering any nominees for the Board submitted by such Panel. Because of the nearness of the expiration of the 1971 Panel's term of office, it may be unnecessary to have its members

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17. *See* N.T. 106-08, 111-13.

18. The distinguished members of the Panel testified as to its operation. There was nothing in the record to suggest any impropriety whatsoever on their part. However, the question at issue is how they were appointed, not how they conducted themselves.

19. In the *Burton* case, *supra*, the Court used this language at page 725:

> ". . . [N]o State may effectively abdicate its responsibilities [under the Fourteenth Amendment] by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."

20. *See* N.T. 265-66. Counsel for plaintiffs conceded at N.T. 266 that this case is not concerned "with the composition of the School Board." Past nominations which have not been confirmed through appointment to the Board by the Mayor will be ineffective.

replaced via a proper selection process. However, the district court should enjoin the present Mayor from discriminating in regard to the 1973 or future Panels and should require that before the 1973 Panel is selected, the Mayor or his staff submit to the court evidence that organizations in the black community which qualify for the various categories of section 12-206(b) of the Educational Supplement have received proper consideration.[21]

The district court's order dismissing plaintiff's complaint will be vacated, except as to the Educational Nominating Panel, and the case remanded to the district court for further proceedings consistent with this opinion.

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21. Mayor Tate has been succeeded by the Honorable Frank Rizzo and the present case has, of course, involved no showing that Mayor Rizzo has in any way discriminated against blacks. Nevertheless, on this record, Mr. Zecca continues as a Deputy Mayor and since this court finds that plaintiffs have shown on this record discrimination in regard to the present Panel, the federal courts must assure that the appointment of the 1973 Panel is free from taint. *Cf. Conover v. Montemuro*, — F.2d — (3d Cir. No. 71-1871, at p. 13 of slip opinion of 12/20/72). Also, we repeat that the defendant Mayor never testified and the court passes no personal judgment on him, but it is required to act on the basis of the record before it.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-2042

EDUCATIONAL EQUALITY LEAGUE, FLOYD L. LOGAN, W. WILSON GOODE, VERONICA KELLAM, by her mother and next friend, ELIZABETH KELLAM, and MICHAEL GREEN, by his father and next friend, COOLIDGE GREEN on behalf of themselves and all others similarly situated, *Appellants*

v.

HONORABLE JAMES H. J. TATE, Mayor of the City of Philadelphia, and
THE EDUCATIONAL NOMINATING PANEL

(D. C. Civil Action No. 71-1938)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

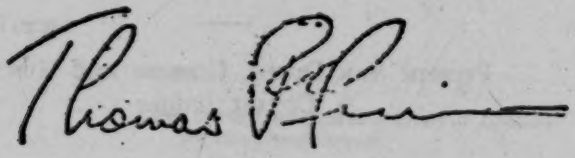
Present: VAN DUSEN, GIBBONS and HUNTER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 8, 1971, be, and the same is hereby vacated, except as to the Educational Nominating Panel, and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:



Clerk

January 11, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2042

EDUCATIONAL EQUALITY LEAGUE, FLOYD L. LOGAN, W. WILSON GOODE, VERONICA KELLAM, by her mother and next friend, ELIZABETH KELLAM, and MICHAEL GREEN, by his father and next friend, COOLIDGE GREEN on behalf of themselves and all others similarly situated, *Appellants*

v.

HONORABLE JAMES H. J. TATE, Mayor of the City of Philadelphia, and THE EDUCATIONAL NOMINATING PANEL

Present VAN DUSEN, GIBBONS and HUNTER, *Circuit Judges*

ORDER AMENDING OPINION

It is ORDERED that page 11 of the slip opinion filed January 11, 1973, in the above matter is amended as follows:

A. The wording after the semi-colon in the second sentence in the paragraph beginning on that page is changed to read as follows:

> "they do not challenge the operation of the panel insofar as it resulted in appointments to the Board made prior to the filing of this civil action in August 1971.[20]"

B. The following wording is added at the end of the first sentence in footnote 20: "in August 1971."

C. This sentence is inserted immediately after the first sentence in footnote 20:

"On remand, the district court should consider the continuing effectiveness of appointments to the Board made after August 1971 on the basis of all the facts which may be developed at the hearing on such remand."

By the Court:
FRANCIS L. VAN DUSEN
Circuit Judge

Dated: February 21, 1973.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-2042

EDUCATIONAL EQUALITY LEAGUE, FLOYD L. LOGAN, W. WILSON GOODE, VERONICA KELLAM, by her mother and next friend, ELIZABETH KELLAM, and MICHAEL GREEN, by his father and next friend, COOLIDGE GREEN, on behalf of themselves and all others similarly situated, *Appellants*

v.

HONORABLE JAMES H. J. TATE, Mayor of the City of Philadelphia, and THE EDUCATIONAL NOMINATING PANEL

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN and HUNTER, *Circuit Judges*

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Francis L. Van Dusen

FRANCIS L. VAN DUSEN
Judge

Dated: February 11, 1973

SUPREME COURT U. S.
JUN 21 1973

IN THE

Supreme Court of the United States

October Term, 1972 No. 72-1264

THE MAYOR OF THE CITY OF PHILADELPHIA AND THE EDUCATIONAL NOMINATING PANEL OF THE CITY OF PHILADELPHIA,
Petitioners

v.

EDUCATIONAL EQUALITY LEAGUE, et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The Opinion of the Court of Appeals, filed January 11, 1973, modified by Order of the Court on February 21, 1973, not yet reported, appears in the Appendix to the Petition for Certiorari, beginning at page 38.

The Opinion of the District Court is reported at 333 F. Supp. 1202 (E.D. Pa. 1971), and appears in the Appendix to the Petition for Certiorari, beginning at page 30.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 11, 1973. A timely petition for re-hearing and re-hearing en banc was denied on February 22, 1973. Petition for Certiorari was filed on March 16, 1973 and was granted on May 7, 1973. The jurisdiction of this Honorable Court is invoked under 62 Stat. 928, 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

Whether the Court of Appeals' reversal, based on its finding of direct evidence of intent to discriminate on the basis of race on the part of the former Mayor of Philadelphia, violated the constraint of Federal Rule of Civil Procedure 52 (a) which limits reversals to clearly erroneous findings?

Whether evidence of statistical under-representation of black persons combined with an opportunity to discriminate is the appropriate formula to shift the burden of proof in this case:

(1) where the chief elected official's discretionary power of appointment is being reviewed by the Court;
(2) where the qualifications for appointment are definite and limiting and have never been subjected to constitutional attack;
(3) where, regardless of the executive's involvement and the limiting qualifications, the positions available are so small in absolute number as to make statistical under-representation inconclusive; and
(4) where the unrebutted evidence discloses that under former Mayor Tate, minorities made impressive advancements in all fields and at all levels of City government?

Whether the Court of Appeals was justified in fashioning its Order prospectively where the foundation of its holdings was based on evidence of practices of former Mayor Tate's administration and where absolutely no evidence exists that the present Mayor, Frank L. Rizzo, not a party to the action, has discriminated on the basis of race.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Article II:

> Section 2. The President . . . shall nominate and, by and with the advice and consent of the Senate, shall appoint . . . all other officers of the United States. . . . But the Congress may by law vest the appointment of such inferior officers, as they think proper in the President along. . . .

First Class City Public Education Home Rule Act of August 9, 1963, P.L. 643 [53 P.S. §13202 (Pocket Part 1972-73)]:

> **Article II, Section 2: Cities empowered.** Any city of the first class may frame and adopt charter provisions governing the administration of a separate and independent home rule school district. . . .

Philadelphia Home Rule Charter, Adopted by the Electors April 17, 1951:

> **Section 3-404. All other officers.** Except as expressly otherwise provided in this charter, all appointed officers and all members and all officers of boards and commissions shall serve at the pleasure of the appointing power. . . .

Philadelphia Home Rule Charter, Educational Supplement Adopted by the Electors, May 18, 1965:

ARTICLE XII
PUBLIC EDUCATION

CHAPTER 1
THE HOME RULE SCHOOL DISTRICT

Section 12-100. The Home Rule School District.

A separate and independent home rule school district is hereby established and created to be known as "The School District of Philadelphia."

Section 12-101. The New District to Take Over All Assets and Assume All Liabilities of the Predecessor School District.

The home rule school district shall

(a) succeed directly the now existing school district for all purposes, including, but not limited to, receipt of all grants, gifts, appropriations, subsidies or other payments;

(b) take over from the now existing school district all assets, property, real and personal, tangible and intangible, all easements and all evidences of ownership in part or in whole, and all records, and other evidences pertaining thereto; and

(c) assume all debt and other contractual obligations of the now existing school district, any long term debt to be issued, secured and retired in the manner now provided by law.

CHAPTER 2
THE BOARD OF EDUCATION

Section 12-200. The Board Created; Its Function.

There shall be a Board of Education of the School District of Philadelphia which shall be charged with the administration, management and operation of the home rule school district.

Section 12-201. Members of the Board; Method of Selection.

There shall be nine members of the Board of Education who shall be appointed by the Mayor from lists of names submitted to him by the Educational Nominating Panel, or, if enabling legislation is enacted by the General Assembly of the Commonwealth, elected on a non-partisan basis by the qualified voters of the city, all as more fully set forth in later sections of this Chapter.

Section 12-202. Eligibility for Board Membership.

Members of the Board of Education shall be registered voters of the City. No person shall be eligible to be appointed or elected to more than two full six-year terms.

Section 12-203. Terms of Board Members.

The terms of members of the Board of Education shall begin on the first Monday in December and shall be six years except that (1) of the first members of the Board appointed and if later there be an elective Board, of the first members elected, three shall be appointed or elected for terms of two years, three for terms of four years, and

three for terms of six years, and (2) if the General Assembly enacts legislation permitting the election of members of the Board on a non-partisan basis, the terms of all appointed members shall expire on the first Monday of December immediately following the municipal election at which the first elective Board is elected.

Section 12-204. Removal of Members of the Board.

Members of the Board of Education may be removed as provided by law.

Section 12-205. Vacancies on the Board.

A vacancy in the office of member of the Board of Education shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died or resigned. If a member of the Board is removed from office, the resulting vacancy shall be filled as provided by law.

Section 12-206. Educational Nominating Panel; Method of Selection.

(a) The Mayor shall appoint an Educational Nominating Panel consisting of thirteen (13) members. Members of the Panel shall be registered voters of the City and shall serve for terms of two years from the dates of their appointment.

(b) Nine members of the Educational Nominating Panel shall be the highest ranking officers of City-wide organizations or institutions which are, respectively:

(1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,

(2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,

(3) a public school parent-teachers association,

(4) a community organization of citizens established for the purpose of improvement of public education,

(5) a federation, council, or other organization of non-partisan neighborhood or community associations,

(6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,

(7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,

(8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and

(9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City.

(c) In order to represent adequately the entire community, the four other members of the Educational Nominating Panel shall be appointed by the Mayor from the citizenry at large.

(d) In the event no organization as described in one of the clauses (1) through (9) of subsection (b) exists within the City, or in the event there is no such organization any one of whose officers is a registered voter of the City, the Mayor shall appoint the highest ranking officer who is a registered voter of the City from another organization or institution which qualifies under another clause of the subsection.

(e) A vacancy in the office of member of the Education Nominating Panel shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died, resigned, or was removed.

(f) The Educational Nominating Panel shall elect its own officers and adopt rules of procedure.

Section 12-207. The Educational Nominating Panel; Duties and Procedure.

(a) The Mayor shall appoint and convene the Educational Nominating Panel (1) not later than May twenty-fifth of every odd-numbered year, and (2) whenever a vacancy occurs in the membership of the Board of Education.

(b) The Panel shall within forty (40) days submit to the Mayor three names of qualified persons for every place on the Board of Education which is to be filled. If the Mayor wishes an additional list of names, he shall so notify the Panel within twenty (20) days. Thereupon the Panel shall within thirty (30) days send to the Mayor an additional list of three qualified persons for each place to be filled. The Mayor shall within twenty (20) days make an appointment or, as provided in the following subsection, certify a nomination from either list for each place to be filled.

(c) If the General Assembly of the Commonwealth shall have previously enacted enabling legislation permitting members of the Board of Education to be elected on a non-partisan basis, not later than September fifteenth of the odd-numbered year in which the legislation was enacted or the ensuing odd-numbered year, the Mayor shall select nine names from either one or two lists of 27 names submitted by the Educational Nominating Panel according to the procedure set forth in subsection (b) and shall certify those nine names to the county board of

elections as his nominations for members of the Board of Education. In certifying the names of his nominees to the county board of elections the Mayor shall designate three of his nominees as candidates for terms of two years, three for terms of four years and three for terms of six years. The ballots or ballot labels shall not contain any party designation for any of the candidates nominated by the Mayor, and under each name there will be a space permitting the voter to write in the name of any other person. In every instance the Mayor's candidate will be elected if, but only if, he receives more votes than any other candidate whose name is written in. In every subsequent odd-numbered year, three members of the Board shall be nominated by the Mayor from names submitted to him by the Educational Nominating Panel and elected in the same manner provided by this subsection, and whenever a vacancy occurs the procedure for filling it shall be similar whether the vacancy be filled at a special election proclaimed by the Mayor or at a municipal election.

(d) The Educational Nominating Panel shall invite business, civic, professional, labor, and other organizations, as well as individuals, situated or resident within the City to submit for consideration by the Panel the names of persons qualified to serve as members of the Board of Education.

(e) Nothing herein provided shall preclude the Panel from recommending and the Mayor from appointing or nominating persons who have previously served on any board of public education other than the Board of Education created by these charter provisions.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. Section 1343(3) alleging violation of 42 U.S.C. Section 1983. Specifically, the Educational Equality League (hereinafter League, plaintiffs) alleges that the former Mayor of the City of Philadelphia discriminated on the basis of race in his appointments to the Educational Nominating Panel in May of 1971.

The method of appointing persons to the Educational Nominating Panel is established by the Educational Supplement to the Philadelphia Home Rule Charter, approved by the electors on May 18, 1965, pursuant to the Act of August 9, 1963, P. L. 643, 53 P. S. Sections 13201-13223. The constitutionality of the Charter has not been questioned.

The Charter provides that during every odd-numbered year the Mayor shall appoint and convene a panel of 13 qualified persons to be called the Educational Nominating Panel ("Panel"). The function of this panel is to nominate three persons for each vacancy on the Board of Education of the School District of Philadelphia ("Board"). From the three persons (or six persons since, if the Mayor desires an *additional* three persons for each vacancy, he merely requests additional names), the Mayor selects and appoints a person to the vacancy on the Board. The Mayor's appointments to the Board have not been challenged, nor indeed, has the quality or dedication of the actual appointees been questioned.

The qualifications for appointment to the Panel vary. Four (4) Panel members must be from the "citizenry at large" "[i]n order to represent adequately the entire community. . . ." Charter, 12-206(c).[1] The remaining

1. The Mayor can, if he chooses on his own initiative, appoint from additional organizations of his own selection to fill these four "at large" positions.

nine (9) panel members "shall be the highest ranking officers of City-wide organizations or institutions. . . ." Charter, 12-206(b). These organizations are described with particularity as:

> (1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,
>
> (2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,
>
> (3) a public school parent-teachers association,
>
> (4) a community organization of citizens established for the purpose of improvement of public education,
>
> (5) a federation, council, or other organization of non-partisan neighborhood or community associations,
>
> (6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,
>
> (7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,
>
> (8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and
>
> (9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City.

Charter, 12-206(b) (1)-(9).

On May 25, 1971, Mayor Tate appointed and convened the Panel.

On August 6, 1971 the Educational Equality League sued Mayor Tate and the Panel alleging the Mayor made his appointments on racial criteria in violation of the Civil Rights Act of 1866, 42 U.S.C. Section 1983 and requesting a speedy hearing, an injunction against the panel from acting, a judgment declaring that the Mayor discriminated on the basis of race and an order directing the Mayor to appoint a panel "fairly representative of the racial composition of the school community." Complaint, p. 8.

After expedited pre-trial discovery was completed a hearing was held on August 25 and September 7, 1971 before the Honorable Raymond Broderick, Judge of the United States District Court for the Eastern District of Pennsylvania.

At the hearing, the Educational Equality League attempted to offer evidence to support two theories: that the Mayor directly and personally discriminated against black persons when he appointed the Panel; and that the statistical evidence demonstrating the percentage of blacks in the general population of Philadelphia and the percentage of black students in the population of the School District of Philadelphia as compared with the percentage of blacks appointed to the thirteen member Panel created a presumption of discrimination by the Mayor.

The Mayor and Panel offered evidence to support several theories of defense: that the appointments of the Mayor are protected from judicial interference by virtue of the executive's inherent discretion and the constitutionally mandated doctrine of separation of powers; that the Mayor's appointments satisfied the qualifications required by the Charter; that the qualifications required by the Charter vitiated the applicability of the Educational Equality League's statistical theory since more than mere citizenship and residency are required by the Charter to qualify for appointment to the Panel; and that the statistical theory is invalid as applied to the Panel since the Panel is so small that each individual change on the Panel results

in extremely large changes in percentages. Finally, evidence established that the Mayor personally championed the expansion of opportunity for blacks in City employment as well as in appointed and elective political positions and evidence was offered to contradict any assertion of personal discrimination as to the Mayor.

On November 8, 1973, the District Court issued its Findings of Facts, Conclusions of Law and Order, dismissing the complaint with prejudice. 333 F. Supp. 1202.

The District Court found inapplicable the "percentage rationale," i.e., the Educational Equality League's theory that a prima facie case or presumption of discrimination can be proved by comparing the percentage of blacks in the population of the City of Philadelphia with the percentage of blacks appointed to the 1971 Panel. 333 F. Supp. at 1207.

The District Court discussed but refused to find that the Mayor had discriminated on the basis of race in his appointments to the 1971 Panel.

The District Court did not reach the questions of executive discretion and separation of powers, although it expressed doubts as to its power to interfere with the discretion of an elected executive in his discretionary appointments. 333 F. Supp. at 1206.

The District Court did not reach or discuss the inapplicability of the percentage rationale in relation to the qualifications required by the Charter beyond citizenship and residency.

On November 9, 1971, the Educational Equality League filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit.

On December 5, 1972 argument on the briefs was heard by Judges Van Dusen, Gibbons and Hunter.

On January 11, 1973 the Court of Appeals issued its judgment vacating the judgment of the District Court except as to the Educational Nominating Panel, and re-

manding the cause to the District Court for further proceedings.

Timely Petitions for Rehearing were filed by each party, and a Petition for Rehearing En Banc was filed by the Mayor of the City of Philadelphia. All were denied, the Educational Equality League's on February 21, 1973 and the Mayor's on February 22, 1973.

On February 21, 1973 the Court of Appeals entered an order amending its order of January 11, 1973. The Court of Appeals found as a fact that the appointments by the Mayor to the Panel were not within the executive's discretion and that the selection process had a discriminatory effect. The Court of Appeals applied the percentage rationale holding that demonstrating under-representation and an opportunity for discrimination is all that is necessary to establish a prima facie case. Finally, the Court of Appeals found as a fact that the *former* Mayor had discriminated on the basis of race in his selections to the Panel and based on this finding, required the *present* Mayor to submit the bases for his executive judgments to the scrutiny of the District Court on remand.

These findings by the Court of Appeals were directly contrary to those made by the District Court. Furthermore, it failed to consider the evidence adduced that directly contradicted the witness relied upon by the Court of Appeals, and the evidence establishing that Mayor Tate had personally opened areas of opportunity to minorities that had previously been denied them.

The Mayor of the City of Philadelphia and the Educational Nominating Panel moved the Court of Appeals for a Stay of its Mandate pending Petition to the Supreme Court for a Writ of Certiorari. The Court of Appeals ordered its mandate stayed for 15 days with "no further extension. . . ." Order of United States Court of Appeals, March 2, 1973.

The Petition for a Writ of Certiorari was filed on March 16, 1973, and the Petition was granted on May 7, 1973.

SUMMARY OF ARGUMENT

I. The Constitutional Doctrine of Separation of Powers, as interpreted by this Court, precludes judicial interference in areas involving the discretionary powers of the Executive Branch of government. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). This Court traditionnally has been particularly reluctant to permit interference, either by the Courts or by Congress, with the executive's discretionary appointment power. U.S. Const., Art. II, Sec. II, Cl. II; *Myers v. United States*, 272 U.S. 1, 71 L.Ed. 160 (1926); *Kiem v. United States*, 177 U.S. 290, 44 L.Ed. 744 (1900). The law of the Commonwealth of Pennsylvania is similar in that encroachments upon the executive's appointment power by the other co-equal branches of government will not be permitted. *Harding v. Pinchot*, 306 Pa. 139, 159 A. 16 (1932). In ordering the present Mayor to subject his discretionary appointments to judicial scrutiny, the Circuit Court entered into an area closed to it by the Constitution, this Court, and the discretionary doctrine of judicial self-restraint.

II. The Circuit Court was in error in reversing the District Court's finding that plaintiff's statistical evidence was meaningless. In accepting the statistical evidence of plaintiffs, admittedly with no evidence of its significance, the Circuit Court ignored its own decision (en banc) with regard to the burden of proving a statistical theory of discrimination. *Commonwealth of Pennsylvania v. O'Neill*, 473 F.2d 1029 (1973). On a statistical basis, plaintiffs' evidence is meaningless since only the four at-large seats on the Panel lend themselves to plaintiffs' random and independent selection analysis; and, even if it be assumed that all

thirteen seats could be analyzed in that manner, the sample is still too small for significant conclusions to be drawn. It is also impossible to provide for proportionate racial representation or freedom from underrepresentation on a Panel of only thirteen members without necessarily ignoring the rights of Philadelphia's numerically small minority groups. *Hernandez v. Texas*, 347 U.S. 475, 98 L.Ed. 866 (1954); *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880); *Hughes v. Superior Court* of California, 339 U.S. 460, 94 L.Ed. 985 (1949).

III. Rule 52 (a) of the Federal Rules of Civil Procedure limits reversals of findings of fact of the District Court to those findings which are found to be "clearly erroneous" by the Circuit Court. The fact that there might be some evidence favorable to the appealing party is not grounds for reversal. *United States v. Yellow Cab Company*, 338 U.S. 338, 94 L.Ed. 150 (1949). Here the Circuit Court's reversal was based upon irrelevant hearsay within hearsay testimony and upon its own misconstruction of one of the District Court's findings of fact. The record in the District Court discloses an ever-increasing number of black persons employed at all levels of government service over the decade of former Mayor Tate's administration. The evidence of Tate's non-discriminatory public service was overwhelming; the evidence to the contrary was unsubstantial, if existant.

IV. The Circuit Court used an inappropriate standard in determining that plaintiffs had established a prima facie case of discrimination, and misconstrued the extent of plaintiffs' federally protected rights. There is no constitutional right to appointment to public office; and since there is

no evidence to indicate that plaintiffs were unconstitutionally denied consideration for public office, the Circuit Court erred in finding that plaintiffs had established a prima facie case of violation of a federally protected right. *Carter v. Greene County*, 396 U.S. 320, 24 L.Ed. 2d 549 (1970); *Turner v. Fouche*, 396 U.S. 346, 324 L.Ed. 2d 597 (1970).

V. This action was filed against former Mayor James H. J. Tate alleging discrimination in his personal discretionary appointments to the Educational Nominating Panel. Without any evidence of record with regard to present Mayor Frank L. Rizzo (he had not yet been elected at the time of trial) and based upon an unsubstantiated, unwarranted and incorrect assumption of the duties of Deputy to the Mayor Anthony P. Zecca (retained by Rizzo after having served under Tate), the Circuit Court directed the District Court to review the discretionary appointments of Mayor Rizzo. This prospective application of injunctive relief against a non-party, admittedly without a shred of evidence supporting it, is a clear abuse of the Circuit Court's power and discretion. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 89 L.Ed. 667 (1944); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 6 L.Ed. 2d 551 (1961).

ARGUMENT

I. The Constitutional Doctrine of Separation of Powers and the Doctrine of Judicial Self-Restraint Preclude Judicial Intervention into the Discretionary Powers of the Executive Branch of Government.

This case involves the exercise of the appointment power of the Mayor as authorized by the Educational Supplement to Philadelphia's Home Rule Charter. The decision of the Circuit Court to subject the Mayor's appointment to judicial scrutiny amounts to a serious encroachment by the judiciary on the executive's powers and violates the constitutional mandate that each branch of government be free to act in its respective domain.

The gravity of the violence done by the Circuit Court to our basic concepts of constitutional government is best exhibited by analogizing to the Federal Judiciary. Assuming a disproportionately small percentage of black judges in the Federal Judiciary as compared to their proportion of the national population, the law as interpreted by the Circuit Court in this case would require the President of the United States to substantiate his nondiscrimination in his judicial appointments and further substantiate his proper consideration of blacks in making those appointments. It would also inferentially require that all future appointees be black until such time as the percentage of black judges equals the percentage of blacks in the general population.

Perhaps a more pointed analogy can be made to the recent appointments to this Honorable Court. While recent vacancies existed in this Court, much was made in the Nation's press of the fact that there had never been a woman Justice of the Supreme Court. The names of several outstanding female lawyers and jurists were bandied about as potential appointees. A woman was not appointed. The logic of the Circuit Court would require the President to prove that he was not guilty of sex discrimination in appointing Mr. Justice Powell and Mr. Justice Rehnquist to this Court.

The Federal Constitution divides our national government into three separate and independent branches—the Legislative, the Executive and the Judicial. In commenting on this constitutional blueprint, James Madison stated to the First Congress:

> If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers.

1 Annals of Congress 581.

The Separation of Powers Doctrine provides that each branch, in the exercise of its granted powers, be free from limitations or interference from the other branches, unless such encroachments are provided for in the Constitution. With regard to the appointment power of the Federal executive branch the United States Constitution, Art. II, Section II grants to the President the power of appointment of all officers of the United States whose appointment is not otherwise provided for. This appointment power is generally subject to the advice and consent of the Senate:

> [B]ut the Congress may by Law vest the appointment of such inferior officers, as they think proper in the President alone . . .

In his landmark decision is *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), Mr. Chief Justice Marshall held that the judiciary did not have the power to interfere with the prerogatives of the executive branch of the government.

The facts of *Marbury* are so well known that they need only be summarized here. William Marbury was an appointee of the outgoing President, John Adams, and, while his appointment had been made, it was not delivered by the new Secretary of State, James Madison. Marbury sought an order in mandamus commanding the Secretary of State to deliver the appointment. In discussing the propriety of the remedy, the Court said at page 169:

> The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation.

And more importantly at page 170-171:

> Where the head of a department acts in a case in which executive discretion is to be exercised; . . . it is again repeated, that any application to a Court to control, in any respect, his conduct would be rejected without hesitation.

The first paragraph quoted above, speaks of the basis for the doctrine of judicial restraint in political questions. The second paragraph states a principal of law which denied to the judiciary the power to interfere in areas of executive discretion.

Marbury v. Madison is analogous to the case at bar. Although the discretion of the President might be considered to be far greater than that of the Mayor of Philadelphia, the difference is one of quantity rather than quality, for the prerogatives of the executive branch in a tripartite form of government are constant, and any court, as part of the judiciary, must refrain from interfering with these prerogatives.

Applied to the present litigation, *Marbury* stands for the proposition that legal appointments within the discretion of the Mayor may not be disturbed. Although the Complaint in the instant action does not directly ask for mandamus, the relief demanded was that the present Panel be dissolved and new appointments be made. These new appointments, the League demands, must more adequately represent the black population of the City. This so-called adequate representation can only be achieved by increasing the number of blacks on the panel. The demand is,

therefore, that the Mayor abandon his judgment and discretion and perform the purely executive function of appointing in an atuomatic, ministerial way—that is, choose anyone, so long as he is black.[2]

The Circuit Court chose to allow the 1971 Panel to die a natural death, but accepted the League's under-representation argument and directed the District Court to examine the new Mayor's appointments to the 1973 Panel for the presence or lack of discrimination in those appointments. This or any similar limitation or restraint on the powers of the Chief Executive of the City is thoroughly impermissible, and the Circuit Court erred in directing such an invasion of the executive discretion.

An exhaustive analysis of the doctrine of separation of powers is contained in Mr. Chief Justice Taft's Opinion for this Court in the case of *Myers v. United States*, 272 U.S. 1, 71 L.Ed. 160 (1926). The issue involved concerned Congressional encroachment on the appointment and removal power of the President. This Court held that the Tenure of Office Act of 1867 was unconstitutional insofar as it attempted to prevent the President from removing executive officers appointed by him with the advise and consent of the Senate.

In the case of *Bailey v. Richardson*, 182 F. 2d 46 (D.C. Cir., 1950) *affirmed* 341 U.S. 918, 95 L.Ed. 1352 (1951), Judge Prettyman stated at page 62:

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2. Apparently the underlying logic for plaintiffs' case is that only a member of a given racial or ethnic group can adequately represent the interests of that racial or ethnic group on any governmental board or commission (N.T. 24-6, Appendix 46a-48a). Aside from being patently ridiculous on its face, this contention was contradicted by plaintiff W. Wilson Goode and plaintiffs' witness Alvin E. Echols. Goode was critical of black Panel-member Freeman Hankins (N.T. 17, Appendix, 42a) and some black members of the School Board (N.T. 28, Appendix, 49a). Echols testified that the "WASPS" are "a great friend of Black people." (N.T. 101). It would seem therefore that some whites better represent the black community than some blacks.

> The judiciary cannot assume responsibility for the sufficiency of the qualifications of the executive employees without assuming corresponding responsibilities for the conduct of executive affairs. It has no such power. The courts cannot hold as a rule of law that grounds for disqualification of subordinate executive employees reasonable in the mind of the executive must also be reasonable in the mind of the courts. It is inescapable from the Constitution's separation of powers that the qualification and disqualification of executive employees is for executive determination; . . ."

The case of *Ex Parte Hennen*, 13 Pet. 230, 10 L.Ed. 138 (1839) involved the removal of a District Court clerk by the district court judge who was vested by Congress with the power to appoint the clerk. This Court stated that it was without power to afford redress to the discharged clerk; that is, the exclusive power to appoint was vested in the district judge's discretion, and this Court could not intervene. It is submitted that where this Court refuses to interject itself into matters of the exercise of discretion on the part of the lower officials within its own branch of government, there is all the more reason in light of the Constitutional mandate of separation of powers to refuse to intervene in the exercise of the discretion of the other branches of government.

Furthermore the concept of separation of powers is also basic to Pennsylvania government. *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 51, 274 A. 2d 193 (1971); *Hayes v. City of Scranton*, 354 Pa. 477, 47 A. 2d 798 (1946); *Wilson v. Philadelphia School District*, 328 Pa. 225, 195 A. 90 (1937). In the words of the Pennsylvania Supreme Court in the *Dauphin County Grand Jury Investigation Proceedings (No. 1)*, 332 Pa. 289, 295, 2 A. 2d 783 (1938):

> . . . [I]t is basic and fundamental in our system of government that the powers of the three coordinated branches of government are and should be separate

> and kept clear, the one from the other. The Judicial Branch cannot assume overlordship of the Executive or Legislative, or vice versa.

Thus, the Pennsylvania Supreme Court has consistently refused to interfere with the Executive's power of appointment.

The Circuit Court held that since the Panel was not part of the Mayor's personal staff, the use of executive discretion was not pertinent to proper consideration of the appeal.

> . . . [D]efendants reason that a member of the executive must have considerable discretion in the choice of his personal staff and that the Fourteenth Amendment should not be interpreted to restrain the exercise of this discretion. It is unnecessary for this court to decide whether the Fourteenth Amendment is limited in this way, because it is clear from the language of the Educational Supplement and from the legislative history quoted earlier that the Panel was not intended to operate as part of the staff of the Mayor.

(Appendix to Pet. for Cert. p. 46).

In so holding, the Circuit Court considered its own version of defendants' argument. The defendants do not limit executive discretion in appointment to "considerable" discretion; the discretion is as absolute as the enabling authority allows. The defendants do not limit executive discretion in appointment to the executive's "personal staff", for the discretion is as extensive as the enabling authority allows. In limiting the extent of the executive power of appointment to "considerable discretion in the choice of his personal staff", the Circuit Court improperly invaded the executive's discretion and ignored decisions of this Court and of the Supreme Court of Pennsylvania.

In *Keim v. United States*, 177 U.S. 290, 44 L. Ed. 744 (1900), this Court, considering the dismissal of a mere clerk from the Department of the Interior, held at page 293:

> The appointment to an official position in government, *even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment.* The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore, *it is one of those acts over which the Courts have no general supervising power.* [emphasis ours]

See also *Parsons v. United States*, 167 U.S. 324, 42 L. Ed. 185 (1897).

A similar decision was reached by the Pennsylvania Supreme Court in the case of *Harding v. Pinchot*, 306 Pa. 139, 159 A.16 (1932). Pennsylvania law vested in the governor the power to appoint notaries public throughout the Commonwealth.[3] Plaintiff had been a notary public for twenty-four years, receiving successive appointments from six governors. Governor Gifford Pinchot refused to reappoint the plaintiff in 1931. In reviewing the extent of the governor's power of appointment in this case, the Pennsylvania Supreme Court held:

> These two acts empower the governor to judge the number and personality of those appointed by him to be notaries in the state. Inasmuch as these appointments are *entirely subject to his discretion, he may refuse to appoint for reasons best known to himself or for no reason*, and what is true of original appointments is applicable to reappointments. [emphasis ours].

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3. The Act of March 5, 1791, 3 Smith's Laws, 6, §2; The Act of February 19, 1873, P. L. 36.

Section 12-206 of the Educational Supplement vests the Mayor with the power to appoint members of the Educational Nominating Panel subject only to the unchallenged qualifications for service embodied in that section. In ordering the District Court to review and pass judgment upon the new Mayor's discretionary appointments to the 1973 Panel, the Circuit Court invaded an area closed to it by this Court.

The decision of the Circuit Court to subject discretionary appointments of the Mayor to judicial scrutiny also violates fundamental concepts of judicial self-restraint in the issuance of mandatory injunctive relief. It is a well-settled principle of law that, although a court can tell the executive to exercise his discretion or to perform a ministerial duty, a court is powerless to substitute its judgment for that of the executive or to otherwise interfere with the exercise of the executive's discretion. *Panama Canal Co. v. Grace Lines, Inc.*, 356 U.S. 309, 2 L. Ed. 2d 788 (1958); *Wilbur v. United States, ex rel. Kadrie*, 381 U.S. 206, 74 L. Ed. 809 (1930); *Marbury v. Madison*, 1 Cranch 137.

In commenting on this principle of judicial self-restraint, Judge Kalodner of the Third Circuit Court stated in the case of *Huntt v. Government of Virgin Islands*, 382 F. 2d 38, 45 (1967):

> This self-imposed limitation on judicial power stems from the doctrine of separation of powers; Courts cannot invade the jurisdiction of other departments of government in matters of policy, and for a Court to substitute its judgment of discretion for that of a member of the executive branch of government would amount to such an invasion.

Thus in *Huntt*, the Third Circuit Court refused to interfere with the discretionary judgment of the Territorial Government of the Virgin Islands.

Finally, the essence of the elective process is that the electors give their authorization to a person to exercise his

discretion, be that person elected to executive, legislative or judicial office. As Chief Justice Marshall held in *Marbury v. Madison, supra* at page 166:

> The conclusion from this reasoning is, that where the heads of departments are political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, *nothing can be more perfectly clear than that their acts are only politically examinable.* [emphasis ours]

It is for the voters of Philadelphia (29% black) and not the Circuit or District Court to pass judgment upon the Mayor's exercise of the discretion inherent in his office.

Thus it is submitted that the decision of the Circuit Court violates the constitutional mandate of separation of powers, ignores any considerations of judicial self-restraint and corrupts the elective process which is at the very basis of our governmental philosophy.

II. The Circuit Court violated Rule 52(a) of the Federal Rules of Civil Procedure in Reversing the District Court's finding that the statistical evidence proffered by plaintiffs was meaningless as an indicator of racial discrimination.

The League has argued to both the District Court and to the Circuit Court that they had established a prima facie case of discrimination by means of their evidence of statistical data indicating a disparity in the percentage of black persons on the Panel relative to the percentage of blacks in Philadelphia's population and/or relative to the percentage of blacks attending Philadelphia's public schools. The District Court rejected this argument, finding the League's statistics to be meaningless as an indicator of racial dis-

crimination (Appendix to Pet. for Cert., p. 35). The Circuit Court reversed the District Court on this point, finding that the League's statistics were "significant" (Appendix to Pet. for Cert., p. 47).

There was and is no legal, logical nor mathematical basis for the Circuit Court's acceptance of the League's statistical evidence. In accepting the statistical evidence offered by the League, the Circuit Court ignored its own decisions with regard to the probative value of statistical evidence and made an independent finding of fact without a finding of clear error by the District Court.

The Circuit Court prefaced its findings of the significance of the League's statistics by stating that:

> "Unfortunately, the parties did not introduce the expert testimony of a statistician on whether the frequency of black appointments to the 13-member Panel fell outside the range to be expected were race not a factor."

In effect, the Circuit Court correctly stated that there was no evidence of the statistical significance of the League's data. Notwithstanding this caveat, the Circuit Court found that the League's statistics were significant. This finding is clearly in opposition to the decision of the Third Circuit Court in the case of *Commonwealth of Pennsylvania v. O'Neill*, 473 F.2d 1029 (1973).

In the *O'Neill* case, the District Court (E.D. Pa.) found that the statistical evidence introduced by plaintiffs established a prima facie case of discrimination in both the hiring and promotional procedures of the Philadelphia Police Department. 348 F. Supp. 1084 (1972). In support of their allegations of discrimination in the Police Department's promotional procedures, plaintiffs introduced data purportedly showing racial discrimination in those procedures. In ruling on the promotional aspect of the case, the District Judge stated that:

> There is no evidence as to the statistical significance of these figures nor as to the passing rates for other promotional examinations.

348 F. Supp. 1084, 1101. Nevertheless, the District Court found that a prima facie case of discrimination in promotions had been established.

On appeal, a Panel of the Third Circuit Court reversed the District Court on this point because of the lack of evidence of the statistical significance of the data relied upon by the District Court. On rehearing en banc the Third Circuit Court (Judge Van Dusen not participating) unanimously arrived at the same holding, pointing out that:

> Thus, although he [District Court Judge] made a finding that the promotional tests disqualify a disproportionate number of black policemen seeking promotion, the Judge pointed to the absence of the statistical significance of the data on which his finding was based.

473 F. 2d 1029, 1031.

Thus, the Third Circuit Court's decision in *O'Neill* requires that a plaintiff attempting to establish a prima facie case of discrimination through statistical evidence do more than merely inundate the trial court with numbers and percentages. Such a plaintiff has the burden of establishing that his numbers have meaning, that they are statistically significant.

Ironically, in the instant case, the Circuit Court has in part reversed the District Court because the District Court viewed the statistical evidence in accordance with the subsequent decision of the Circuit Court in *Commonwealth v. O'Neill*. Furthermore, in ignoring the lack of evidence of statistical significance and ruling as if the statistics had been proven significant, the Circuit Court did precisely what is unanimously held should not be done.

Notwithstanding the fact that the League never met its burden of proof in presenting its statistical evidence, the League's statistics, even in a mathematical vacuum, are meaningless in themselves; and the League's analysis of its statistics is, as found by the District Court, meaningless as an indicator of racial discrimination.

In making their analysis, the League necessarily assumed that the entire 13-member Panel lent itself to a simple random and independent sampling analysis which merely compared the percentage of blacks on the Panel to the percentage of blacks in the City and in the City's public schools. The conclusion they sought, accepted by the Circuit Court, was that the percentage disparity is greater than could be expected if the selection process were random and independent or, in the words of the Circuit Court, "colorblind." (Appendix to Pet. for Cert., p. 47). However, since 9 of the 13 seats on the Panel are appointed according to the unchallenged scheme set out in the Educational Supplement, only the 4-at-large seats appointed from the general public can be legitimately subjected to a random and independent sampling analysis. Appointments to the other 9 seats can not be properly examined using a random and independent sampling analysis absent evidence of the percentage of blacks in each of the 9 categories enumerated in the Educational Supplement. The League offered no such evidence.

Fundamentally, the problem of attaining statistical significance is one of obtaining a sufficiently high degree of confidence in the results obtained from analysis of a sample to justify a statistical conclusion about the whole. In layman's terms, the League's statistical argument and analysis can be perceived by visualizing a huge fish bowl containing one million marbles (representing the approximate adult population of Philadelphia), 666,667 being white marbles, 333,333 being black marbles (representing the approximate racial percentages in Philadelphia). Thus, if a person were to pick one marble out of the bowl, there is a

66⅔% probability that the marble will be white, and a corresponding 33⅓% chance that the marble will be black.

Plaintiffs' statistical analysis is that in selecting the Panel, the Mayor picks 13 marbles out of the fish bowl, each selection being completely at random and independent of other selections. Plaintiffs' argument is that if at least 4 of the 13 marbles (31%) are not black, then racial discrimination has been proven. It is an error-fraught statistical technique to attempt to ascribe statistical significance to percentage figures based on a minute numerical sample.[4] Here, plaintiffs' attempt to parlay racial percentages on a 13-member Panel into a significant conclusion about selection of the Panel. Their sample is simply too small. Therefore, even if it is assumed arguendo that a random and independent selection analysis is applicable to the entire 13-member Panel, the League's statistics still prove nothing.

There is also no logical basis for the decision of the Circuit Court to accept the League's statistical evidence since the Panel itself is too small to permit inferences to be drawn about proportionate representation. It is true that the plaintiffs have continually maintained that they have no constitutional right to any particular percentage on the Panel (N.T. 26, Appendix 48a); yet, the essence of their claim has been deviation from what they feel their proportionate representation should be. Therefore, proportionate representation on the Panel, and the League's indirect attempt to secure it by styling their argument as one for freedom from statistical under-representation, is a vital issue in this case.

The Circuit Court compared the proportion of blacks on the Panel with the racial composition of the public schools (the propriety of this comparison discussed infra, p. 35) and concluded that a prima facie case of discrimi-

4. The problem of placing confidence in obtained statistical results is treated in Hays, William L., *Statistics for Psychologists*, 287-296 (1963), and Guilford, Joy P., *Fundamental Statistics in Psychology and Education*, 214-224 (4th Ed., 1965).

nation had been established. In light of the myriad racial, ethnic and national groups represented among the approximately 2,000,000 people in Philadelphia, it is incredible that the Circuit Court would make a comparison based on proportionate racial representation on a Panel of only 13 members. Whether the proposition of the League and the Circuit Court is that blacks are entitled to statistically proportionate representation or freedom from statistical under-representation, that proposition must apply to all ethnic and national groups with equal force and effect. *Hernandez v. Texas*, 347 U.S. 475, 98 L. Ed. 866 (1954); *Strauder v. West Virginia*, 100 U.S. 303, 308, 25 L. Ed. 664 (1880). However, it is clearly impossible to provide for either proportionate representation or freedom from statistical under-representation on a Panel of only 13 members, even if it be conceded that the Panel should be representative of the City's population from a racial and ethnic viewpoint.

Philadelphia's Puerto Rican community comprises less than 0.5% of Philadelphia's population. Under a theory of proportionate representation, Puerto Ricans would be entitled to only 13/100 of a seat on the Panel.[5] They would be statistically unable to advance a theory of statistical under-representation in their behalf. The same situa-

5. It is interesting to note that plaintiffs' witness, Alvin E. Echols, Jr., feels that "it is absolutely outrageous that our Puerto Rican community has no representation, none, on the Board of Education." (N.T. 100). Under plaintiffs' percentage rationale, of course, Puerto Ricans could not be represented without causing the under-representation of a numerically more deserving group.

Furthermore, plaintiff Wilson Goode testified:

> Certainly, I think that it [Panel or Board] involves the Puerto Ricans and other foreigners. I think that the views of the Jewish community ought to be reflected, I think all views of other groups ought to be reflected, and I think that those desires and aspirations ought to be in some way reflected. (N.T. 25, Appendix 48a).

Mr. Goode did not suggest how a Panel with only 13 members could be such an all-encompassing racial and ethnic mirror.

tion would prevail for the Chinese and American Indian communities, among others, included in Philadelphia's population. Thus, the legal and statistical theories of the League and the Circuit Court, create the very real danger of freezing out persons who are members of numerical minorities from participation on governmental boards and commissions because of the numerical paucity of their particular ethnic group.

It was this very danger of creating superior rights for large minority groups, with regard to employment, that caused this Court to consider the constitutionality of holding picketers in contempt for violating an anti-picketing injunction, where the picketing sought to force a company to hire according to a racial quota. *Hughes v. Superior Court of California*, 339 U.S. 460, 94 L. Ed. 985 (1949). In affirming the contempt citations, Mr. Justice Frankfurter, speaking for the Court, stated at page 464:

> These considerations are most pertinent in regard to a population made up of so many diverse groups as ours. To deny California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of the Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of social and religious concentrations in various cities.

Where there are large numbers of persons regularly being hired or selected, a pattern of acceptance or rejection of any independently identifiable class will appear in the membership of a work force or a jury venire. Thus, if a hiring agent denied blacks employment in a large business in an area with a general population whose labor force contained a substantial proportion of blacks, the dispro-

portionate absence of blacks among the employees could be significant. Likewise, if jury lists contain very few blacks, and the general population contains many blacks, a statistical inference can be drawn. However, the smaller the size of the employing business, the smaller the size of the jury list in question, the less validity the statistical inference has. Thus, a 500 member group of which 15% are black in a general population of 33% has more statistical significance supporting the proposition that a disparity may indicate discrimination than a 13-member panel with 15% blacks and a general population of 33%.

Thus the District Court was correct in its statistical analysis when it found:

> With only thirteen members on the Educational Nominating Panel, the addition or subtraction of one member of any ethnic or racial group results in a change of eight (8) per cent in that group's representation. In this Court's opinion, such wide fluctuations based on small numerical changes in membership on the Panel result from the limited size of the Panel and render such statistics meaningless as an indicator of racial discrimination. Furthermore, in the cases wherein the percentage rational has been adopted, there were a large number of blacks within the population eligible for a large number of positions. This is not the situation in the instant case where a small board is involved, and we can not find that the absence of additional blacks from a thirteen-member panel proves discrimination.

(Appendix to Pet. for Cert., p. 35)

Another level of response to the statistical presumption is on the qualitative level. Not only are the statistics insignificant and meaningless, but the nature of a political appointment to a specialized panel is so different from registration of a voter, the selection of a juror for member-

ship on a jury panel, or the hiring of an employee in a work force, as to make them totally incomparable.

Selection for membership on a jury panel is practically a right of citizenship and does not involve *any* executive discretion whatsoever. The right to vote is one that has been carefully guarded. The right to nondiscrimination in hiring has developed to where the courts have specified duties in the employer to refrain from activities which discriminate or cause a discriminatory impact in the hiring of any independently identifiable class without a rational, job-related basis. *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L. Ed. 2d 158 (1971). However, a political appointment or appointment to a governmental policy position is a vastly different situation. As has been heretofore developed, there is no right to public appointment. The executive has the right to appoint persons in whom he can place his confidence and trust in order to fulfill the duties for which he must bear the ultimate responsibility in the political arena. To restrain him from carrying out his duties by limiting his discretion is tantamount to removing the qualities for which he was originally elected. It is the discretion of the Mayor for which the electors vote. Therefore, assuming arguendo the statistical significance of the League's percentages, such evidence would not be probative of or create a presumption of racial discrimination in a case involving a political appointment to office.

Finally the Circuit Court accepted the League's statistical analysis by inventing a new qualification for membership on the Panel. The Court took note of the fact that the student body of the City's public schools are approximately 60 percent black and concluded:

> "Because one qualification for Panel membership is interest in the public school system, and because the parents of school children are likely to have this interest, a colorblind method of selection might be expected to produce that many black Panel members."

(Appendix to Pet. for Cert. p. 47).

An examination of Section 12-206, of the Educational Supplement reveals no qualification resembling "interest in the public school system."

Aside from the plethora of statistical errors made by the Circuit Court in making its facutal finding of discrimination, the Circuit Court combined legal error with statistical error in comparing the percentage of blacks on the Panel to the percentage of blacks in the school system. The District Court was correct in holding that:

> "The standard when using a percentage rationale to establish a prima facie case of discrimination has always been the number of Blacks qualified to fill the jobs in which the alleged discrimination is taking place. [Citing Cases]. In the instant case that figure would depend on the *adult population* of Philadelphia which is approximately 33%. [Emphasis by the Court]"

(Appendix to Petition for Cert., p. 35).

If the Educational Supplement itself were under constitutional attack as discriminatory against blacks, the racial composition of the public schools conceivably could be relevant. The League has not made that attack. It therefore is no more relevant to the issues presented in this case that the school system is 60% black than it is that the school system is almost 100% under the age of 18. Neither consideration is in any way related to the makeup of the Panel as set out in the Educational Supplement.

Therefore it is respectfully submitted that the Circuit Court was in error in giving credence to and accepting the League's statistical evidence as an indicator of racial discrimination, and it is further submitted that the District Court was correct in its statistical and legal analysis of the League's evidence, and was correct in holding that the evidence was meaningless as an indicator of racial discrimination.

III. The Circuit Court violated rule 52(a) of the Federal Rules of Civil Procedure in reversing the finding of the District Court and independently finding intentional racial discrimination on the part of former Mayor James H. J. Tate.

The Circuit Court found that the League had established a case of direct discrimination. In making this finding the Court relied on a portion of the testimony of plaintiff, W. Wilson Goode, and its own misstatement of a finding of fact of the District Court. Mr. Goode testified that:

> At that time [1969] the Mayor [Tate] made a public statement that he was not going to appoint any more Negroes to the Board [of Education] because, in his feeling, they had adequate representation and that he was going to appoint someone from the nominees to the Board of Education.

(N.T. 16, Appendix 41a).

The Circuit Court found that this testimony was given "without contradiction or objection", and that the District Court had overlooked it.

This testimony was neither uncontradicted by the City nor was it overlooked by the District Court since Deputy to the Mayor Zecca both contradicted Goode's testimony and exposed it as heresay twice removed. Zecca testified:

> Question. Mr. Zecca, we were discussing earlier a statement by Mayor Tate in 1969 that he would not appoint any additional Negroes to the School Board and you said you didn't recall that statement.
>
> Answer. I said I don't think he made such a statement.
>
> Question. Well all right.
> May I show you a very bad copy of the page of the Philadelphia Inquirer, Saturday, May 3, 1969, and the articles says, "he indicated", referring to the Mayor,

"he would not appoint another Negro to the Board because the Negro community has good representation in the two Negroes now serving on the Board."

Do you recall that article?

Answer. The witness: "I don't recall the article specifically but it doesn't say he not going to name another member. It said he indicated that he wouldn't name another member; and this is, of course, the reporter's version of this, but the quote said the Negro community has good representation in the two Negroes now serving on the Board.

They may have asked him whether he was going to appoint any more Negroes to the Board and he said the Negro community has good representation on the Board as it is; just like it has excellent representation right in this story."

(N.T. 259-261, Appendix 91a-93a).

Thus the Circuit Court accepted Mr. Goode's interpretation of a reporter's interpretation of an alleged comment by then Mayor Tate.[6] The District Court properly held that the newspaper article was inadmissable hearsay. (Appendix to Pet. for Cert. p. 36).

Secondly, Mr. Goode testified to the intention of the Mayor. As this Court said in *United States v. Yellow Cab Company*, 388 U.S. 388, 341-342, 94 L. Ed. 150 (1949):

> Finding as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. . . . The Trial Court listened to and observed the of-

6. The proposed Rules of Evidence for the United States Courts and Magistrates, Rule 805, provide that "hearsay within hearsay is not excluded under the "hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules." Neither part of Mr. Goode's utterance conforms with an exception to the hearsay rules.

> ficers who had made the records from which the government would draw an inference of guilt and concluded that they bear a different meaning from that for which the government contends.
>
> It ought to be unnecessary to say that Rule 52 applies to appeals by the government as well as those by other litigants. There is no exception which permits it, even in an anti-trust case, to come to this Court for what virtually amounts to a trial de novo on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court had decided to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not "clearly erroneous."

Furthermore, Mr. Goode and the newspaper article were referring to the Mayor's intention to appoint persons to the Board of Education in 1969 and not to the Educational Nominating Panel in 1971. The League has made no challenge whatsoever to the appointments to the Board, but has limited this suit to challenging appointments made to the Panel in 1971. Notwithstanding the dichotomy of both the time and the subject matter of Mr. Goode's contradicted, heresay testimony, the Circuit Court accepted it and found that "an inference may be drawn that the Mayor in similar manner excluded blacks from consideration as members of the 1971 Panel" (Appendix to Pet. for Cert., p. 43, n. 9). Then, compounding the error of prospective application of non-germaine heresay within heresay testimony, the Circuit Court directed the District Court to fashion prospective relief which purports to bind the personal appointments of the new Mayor who is not and never has been a party to this ac-

tion. (The legal propriety of such relief discussed in Argument V).

In making its findings of direct discrimination, the Circuit Court also relied upon its own erroneous interpretation of a finding of fact of the District Court. The Circuit Court stated that:

> The district court found that Deputy Mayor Zecca was unaware of the existance of black-oriented organizations which were within the requirements of sections 12-206 (b).

(Appendix to Pet. for Cert, p. 43) (The question of the compatibility of "black orientation" and the Educational Supplement discussed infra, p. 41).

The District Court actually stated in Finding of Fact No. 17 that:

> The person assigned by the Mayor of Philadelphia to chose the groups under the enumerated categories, Deputy Mayor Anthony Zecca, at the time of the hearing in the instant case was unaware of the existence of *many* of the black organizations. [Emphasis ours]

(Appendix to Pet. for Cert., p. 32).

The action of the Circuit Court with regard to the findings of the District Court constitute a perfect example of the reasons for the existence of Rule 52(a) of the Federal Rules of Civil Procedure. Rule 52(a) provides in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given

> to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

The Circuit Court based its setting aside of the District Court's Findings of Fact on admittedly unproven statistics; on contradicted, inadmissible hearsay of a declarant's interpretation of a third person's intent, and a misconstruction of one of the District Court's Findings of Fact. Even in a close case, where evidence on any given point has been presented by both sides, and the finding of the Trial Court could conceivably be in favor of either party; a Circuit Court cannot set aside the findings made unless they are "clearly erroneous". *United States v. Yellow Cab Co.*, 388 U.S. 338, 94 L.Ed. 150 (1949); *United States v. Oregon State Medical Society*, 343 U.S. 326, 96 L.Ed. 978 (1952); *United States v. United States Gypsum Co.*, 333 U.S. 364, 94 L.Ed. 746 (1948).

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v. United States Gypsum Co., at page 395.

In the instant case, notwithstanding any question of the credibility of the testimony, a matter particularly for the determination of the trial judge, there is no evidence of record to support a conviction that a mistake had been made by the District Court nor to support the finding of fact independently made by the Circuit Court.

The Circuit Court further mischaracterized the testimony of Deputy to the Mayor Zecca in footnote 13 of its opinion wherein the Court stated that Mr. Zecca "apparently thought that only the AFL-CIO and the Greater Philadelphia Chamber of Commerce fit the specifications, respectively, of Section 12-206 (b) (1) and (2)." (Appendix to Pet. for Cert. p. 43-4). In so criticizing Mr. Zecca the Circuit

Court apparently overlooked his testimony that the Joint Building Trades Council could qualify under Section 12-206 (b) (1) (N.T. 250, Appendix 85a), and further overlooked his testimony that the Philadelphia Industrial Development Corporation, HUD and the Port Development Corporation could qualify under sub-section (2) of Section 12-206 (b). (N.T. 251, Appendix 86a)

In finding direct discrimination, the Circuit Court found that there were "black oriented organizations" which could have met the specifications of Section 12-206 (b). (Appendix to Pet. for Cert. p. 43). This finding of the Circuit Court is apparently taken from the Finding of Fact No. 16 of the District Court:

> 16. There are several organizations reflecting the views and participation of the black community which could qualify under sub-sections 1, 2, 3, 4, 5, 6, and 9 of Section 12-206 (b). (7 of the 9 enumerated classes.)"

(Appendix to Pet. for Cert., p. 31)

The question of whether a particular organization satisfies the requirements of the Educational Supplement is, of course, a mixed question of fact and law; and it is submitted that several of the organizations recommended by plaintiffs do not qualify under the Educational Supplement, and that plaintiffs have failed to recommend any qualified organization for subsections 1, 3, 7 and 8. Plaintiffs have suggested thirteen groups as alternatives to the organizations chosen by the Mayor pursuant to the Educational Supplement. Of the thirteen, six fail to qualify under the Educational Supplement since they are not "City-wide" in scope. The United Negro Trade Union, the Black Educational Forum, the City-wide Black Community Council and the Black Youth Forum do not qualify because of their racial exclusivity. (N.T. 5-8, Appendix 33a-36a). The North City Congress and the Residents' Advisory Board, limited in geographical and representative scope, are also not "City-wide".

Of the seven suggested organizations that could qualify under the Educational Supplement, three (Urban League, NAACP and Health and Welfare Council) have been named to past panels.[7] (Appendix 24a-30a). The Panel member from the Citizens' Committee on Public Education in Philadelphia (not recommended by plaintiffs) has been black for three out of the four Panels. Furthermore, the Federation of Community Councils, twice chosen under Section 12-206 (b) (5), includes among its past vice presidents plaintiff W. Wilson Goode. (N.T. 7, Appendix 35a)

Upon comparison to the various other racial and ethnic groups in the City of Philadelphia, it is apparent that blacks have been very adequately represented. The 1971 Panel consisted of five white Anglo-Saxon Protestants, three Irish, two blacks, two Jews and one Scandinavian. There were no Italians or Poles on that Panel (there has never been a Pole on the Panel) despite the fact that Italians and Poles are among Philadelphia's largest ethnic minorities.

Finally, the Circuit Court's finding of racial discrimination was manifestly unfair to former Mayor Tate. The Circuit Court held that his appointments to the Panel were "tainted"; that there was direct proof of his personal discrimination against black people.

Without attempting to portray former Mayor Tate as anything more than an astute politician, the record he established over his decade of public service evidences a firm commitment to the expansion of opportunities to minority groups, including blacks, at all levels of public service employment as well as in political appointments.

The unrebutted evidence on this record shows that at the time of trial approximately 41% of all City employees were black; that the percentage had risen markedly during

7. Interestingly, one panel member from the Urban League, William S. Rawls, and one panel member from the Health and Welfare Council, Frederick L. Ballard, Esq. were both white men. Furthermore, W. Park Woodrow, present President of the Health and Welfare Council, was appointed to the 1973 Educational Nominating Panel. Mr. Woodrow is white.

the ten-year Tate administration;[8] that between 23% and 24% "of the management personnel in supervisory positions or middle management are minority individuals [Blacks and Spanish speaking Americans, N.T. 342, Appendix 101a]"; that in private industry the percentage of minorities in middle management is approximately 5½%; and that the percentage of persons from minority groups on appointive governmental boards and commissions has increased during the Tate administration. (N.T. 338-42 Appendix 76a-79a).

The evidence also indicates that nationally only 4.1% of all households with an annual income in excess of $15,000 are black, and that the City, under Mayor Tate's administration, exceeded the national average in every respect.[9] Thus although the Mayor can exert only an indirect influence on the hiring and promotion of Civil Service employees, 6.07% of the Civil Service employees earning over $15,000 annually are black. The Mayor has a much greater degree of influence in hiring for positions exempt from Civil Service, and of those positions paying over $15,000 per year, 9.12% are filled by black persons. The Mayor has full discretion with regard to appointment to City boards and commissions, and 12.11% of the members of the various boards and commissions were black. (P-6, Appendix 122a-23a).

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8. Since the population of the City of Philadelphia is approximately 33% black, black persons are obviously statistically overrepresented among City employees, and also quite obviously some other ethnic or racial groups must be under-represented. The 35,454 City employees clearly represent a statistical sample superior to the 13-member Educational Nominating Panel. Therefore, under the legal and statistical theories advanced by the plaintiffs, the City should consciously adjust the number of black employees downward to insure the proper ethnic mix in City employment.

9. The figures presented with regard to City employees relate to an individual wage earner, rather than to a household's income. The national percentage of black individuals earning more than $15,000 per year would be considerably lower. (N.T. 365-6, Appendix 118a-119a).

It is not significant that the percentages with regard to City employees earning over $15,000 per year, are substantially less than the proportion of blacks in the City of Philadelphia. Because of the level of professional and/or technical expertise needed for these positions (e.g. lawyers in the City Solicitor's office), the only relevant criteria upon which a statistical comparison can be made is the percentage of blacks in the employable pool pertient to a particular job (e.g. percentage of blacks among Philadelphia's lawyers).

The record in the District Court discloses an ever-increasing number of black persons employed at all levels of governmental service over the decade of former Mayor Tate's administration. And yet, as the result of the Circuit Court's opinion, the final, unfair judgment of Mayor Tate's administration is one of discrimination against blacks on the basis of their race. The evidence of non-discriminatory public service was overwhelming; the evidence to the contrary was insubstantial.

IV. The Circuit Court erred in ruling that plaintiffs had established a prima facie case of racial discrimination.

The Circuit Court found that there was an opportunity for discrimination and that the League demonstrated a statistical under-representation of blacks on the Panel. The Court then held that a prima facie case of discrimination had been established which the City failed to rebut. It is submitted that since an essential issue presented in this case is the judicial review of the Mayor's discretionary appointment power, as limited by the definite statutory qualifications of the Educational Supplement, which the League has chosen not to challenge, the formula for shifting the burden of proof used by the Circuit Court is inappropriate.

The case of *Carter v. Greene County*, 396 U.S. 320, 24 L. Ed. 2d 549 is similar to the case at bar in that plain-

tiffs there sought an order compelling the Governor of Alabama to appoint blacks to the County Jury Commission. That case arose from a class action filed by black citizens of Greene County, Alabama which alleged racial discrimination in the selection of prospective jurors and in the appointment of an all-white jury commission in the predominately black county. Under relevant Alabama law, jurors are selected by a 3-member jury commission which is appointed by the Governor.

The District Court found that there had been systematic discrimination in the preparation of jury lists, but declined to direct the Governor to appoint blacks to the jury commission. 298 F. Supp. 181.

On appeal, this Court considered the evidence that, for many years (at least 12 years), the jury commission had been composed entirely of white men and agreed with the lower court that plaintiffs had failed to prove their claim. At page 338, this Court held:

> Quite apart from the problems that would be involved in a federal court's ordering the Governor of a state to exercise his discretion in a particular way, we cannot say on this record that the absence of Negroes from the Greene County Jury Commission amounted in itself to a prima facie showing of discriminatory exclusion.

Plaintiffs made a further argument to this Court contending that the District Court should have compelled the appointment of blacks to the jury commission because of an alleged causal connection between the absence of blacks on the jury commission and the discriminatory selection of jurors; and that, for the jury commission to function properly, it must be representative of the community in which it functions. This Court did not agree with that logic, but rather held at page 339:

> The appellants are no more entitled to proportional representation by race on the jury commission than on any particular grand or petit jury.

Similar to the *Carter* case, the League in the instant case has demanded that the Federal Court order the Mayor of Philadelphia to exercise his discretion in a particular manner. In the instant case, the Circuit Court has held that the League established a prima facie case of discrimination on the basis of far less evidence of discrimination than was present in *Carter v. Greene County*. The statistical evidence presented in *Carter* was significant and persuasive (as to discrimination in jury selection) while the League's statistical evidence is meaningless. In *Carter*, the performance of those appointed to the jury commission was proven to be racially discriminatory. In the instant case, the plaintiffs have not challenged the performance of the Panel in nominating persons for service on the Board of Education.[10] Therefore, despite evidence which indicated a total exclusion from appointive governmental service and despite a finding of fact that those appointed systematically excluded blacks from jury service, this Court held in *Carter*, that a prima facie case of discriminatory exclusion from appointive public office had not been established. It is submitted that the Circuit Court here, on the basis of virtually no evidence of discrimination, erred in reversing the District Court and holding that a prima facie case of discrimination had been established.

The Circuit Court further erred in its assessment of the extent of plaintiffs' constitutional rights, and in its interpretation of this Court's holding in the case of *Turner v. Fouche*, 396 U.S. 346, 324 L.Ed. 2d 597 (1970).

Turner v. Fouche was a suit by a class of black plaintiffs who challenged the constitutionality of the method of selection of juries and school boards in use in many counties in Georgia. The statutory scheme at issue pro-

10. Counsel for plaintiffs conceded that this case is not concerned "with the composition of the School Board." (N.T. 266). Furthermore in the words of the Circuit Court, "there was nothing in the record to suggest any impropriety whatsoever on their [Panel members] part." (Appendix to Pet. for Cert., p. 48, note 18).

vided that the County Board of Education consist of five freeholders selected by the Grand Jury which in turn was selected from a jury list selected by a six-member County Jury Commission.

This Court held that plaintiffs had established an unrebutted prima facie case of racial discrimination by demonstrating a substantial disparity between the percentages of negro residents in the County (60%) and the percentage of negroes on the jury list, and that 96% of those rejected as unintelligent or not upright were negro. This Court also delineated the federally protected rights of the *Turner* plaintiffs at page 363, as follows:

> We may assume that appellants have no right to be appointed to the Taliaferro County board of education. But the appellants and the members of their class do have a Federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications.

In distinguishing between consideration for appointment and appointment itself, this Court reaffirmed a distinction it had long since made in jury selection cases. Since *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), this Court has consistently held that systematic exclusion of negroes from grand juries and/or trial juries was unconstitutional, and this Court has consistently reversed criminal convictions on the basis of such systematic exclusion. *Sims v. Georgia*, 389 U.S. 404, 19 L.Ed. 2d 634 (1967); *Jones v. Georgia*, 389 U.S. 24, 19 L.Ed. 2d 25 (1967); *Whitus v. Georgia*, 385 U.S. 544, 17 L.Ed. 2d 599 (1967); *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759 (1965).

Also since 1880, this Court has been equally consistent in holding that a defendant has no right to demand the members of his race be included on the particular jury that indicts or convicts him. *Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667 (1880); *Gibson v. Mississippi*, 162

U.S. 565, 40 L.Ed. 1075 (1896); *Martin v. Texas*, 200 U.S. 316, 50 L.Ed. 498 (1906); *Akins v. Texas*, 325 U.S. 398, 89 L.Ed. 1692 (1945); *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759 (1965); cf. *Hoyt v. Florida*, 368 U.S. 57, 7 L.Ed. 2d 118 (1961).

There can be no discrimination against any racial or ethnic group in considering persons for jury service. Thus a severe disparity between the percentage of blacks eligible for jury service and the percentage of blacks on general jury lists indicates racial discrimination in consideration for jury service. On the other hand a similar disparity on any particular jury is meaningless for no one has the right to be selected to a jury or to have members of his race on the particular jury hearing his case. Indeed, this Court has held that a prosecutor may use the peremptory strike to eliminate *all* of an accused race from a jury. *Swain v. Alabama*, 380 U.S. 202, 221, 13 L.Ed. 2d 759 (1965).

In analogizing to the case at bar, while plaintiffs here arguably may have a right protected by the 14th Amendment to be *considered* for political appointment, they have no constitutional right to political appointment. Therefore in applying *Turner v. Fouche* to the instant case, one must be aware that *Turner* considered those aspects of the school board's selection system which operated to discriminate against blacks in being *considered* for service on the school board, i.e., the discriminatory grand jury selection and the "freeholder" qualification for school board membership.

Thus, a prime factual issue in this case is whether Mayor Tate discriminated against blacks in *considering* persons for service on the Educational Nominating Panel. There is neither evidence nor allegation in the record indicating such discrimination. Moreover, the only evidence related to this issue are the uncontested facts that blacks were appointed to each of the Panels. Necessarily, therefore, blacks could not have been denied consideration for appointment.

In the instant case, the Circuit Court refused to distinguish between consideration for appointment to public office and appointment itself, but rather incorrectly held that "discrimination in the appointment of the Panel was impermissable." (Appendix to Pet. for Cert., p. 46). This holding is inconsistent with the relevant decisions of this Court. Since the maximum extent of plaintiffs' 14th Amendment rights is that they may not be discriminated against in being considered for public office, and since no evidence was introduced to indicate that they were unconstitutionally denied such consideration, it is submitted that the Educational Equality League failed to establish a prima facie case of violation of any federally protected right.

V. Prospective application of injunctive relief against present Mayor Frank L. Rizzo, who has never been a party to this action, is improper, particularly where the sole basis for such injunctive relief is a finding of personal discrimination on the part of former Mayor Tate.

The present suit was brought against former Mayor James H. J. Tate. At no time was evidence produced regarding the administration of present Mayor Frank L. Rizzo, Tate's successor in office. Nevertheless, Circuit Court ordered the staff of Mayor Rizzo to submit to the District Court evidence of non-discrimination in appointments to the Educational Nominating Panel.

Footnote 21 of the Circuit Court's decision suggests the rationale for this direction to the District Court.

> 21. Mayor Tate has been succeeded by the Honorable Frank L. Rizzo and the present case, has, of course, *involved no showing that Mayor Rizzo has in any way discriminated against blacks.* Nevertheless, *on this record,* Mr. Zecca continues as a Deputy Mayor and since this Court finds the plaintiff has shown

> on this record discrimination in regard to the present Panel, the Federal Courts must assure that the appointment of the 1973 Panel is free from taint. Cf. *Conover v. Montemuro*, — F.2d — (1972) (3rd Cir. No. 71-1871, filed December 20, at page 13). [Emphasis ours]

(Appendix to Pet. for Cert., p. 27-8)

There is no record to substantiate the assumption that Mr. Zecca today has any responsibility for appointments to the Panel. In fact, the decision of the District Court in this matter was made prior to Mayor Rizzo's election, therefore, there could be no evidence whatsoever before the Circuit Court regarding the practices of the present Mayor.

Presently Mr. Zecca is a Deputy to Mayor Rizzo. Under Mayor Tate he was alone in this position, however in the Rizzo administration, Philip R. T. Carroll is the Mayor's immediate subordinate, and it is he who oversees the Mayor's Office. Mr. Zecca, as Deputy to the Mayor, shares this title with Michael Wallace, Esquire and Joseph P. Braig, Esquire. In addition, there are now three assistants to the Mayor. Based on the change in the administration and in the Mayor's immediate staff, it would be reasonable to assume that the nomination process for membership or appointments to the various Boards and Commissions within City government has been considerably altered. Although there is no evidence bearing on this subject, the fact is that the procedure for filling such positions, including the Educational Nominating Panel, has been completely revised with Mr. Zecca having no responsibility for those appointments."[11]

It is well-settled that a district court's denial of injunctive relief will not be reversed unless such denial constitutes an abuse of discretion. *Barton v. Eichelberger*, 451

11. Although it may be deemed improper to deviate from the factual record, such deviation is necessitated by the Circuit Court's unwarranted and unsubstantiated assumption with regard to Mr. Zecca's duties in the Rizzo administration.

F.2d 263 (3rd Cir., 1971). Here the District Court refused to grant injunctive relief; yet the Circuit Court, *admittedly without any evidence of racial discrimination on the part of Mayor Rizzo*, directed the District Court to require Mayor Rizzo to submit evidence of his non-discrimination in his appointments to the 1973 Panel. This order of the Circuit Court is a clear abuse of judicial discretion.

Furthermore, in directing the District Court to issue an injunction against Mayor Rizzo, the Circuit Court ignored the constraints of Federal Rule of Civil Procedure 65(d) which provides:

> Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

There was no evidence indicating that Mayor Rizzo in any way acted in concert with Mayor Tate or otherwise participated in Mayor Tate's appointments to the Panel. Therefore there was no factual or legal justification whatsoever for subjecting Mayor Rizzo's appointments to judicial scrutiny, notwithstanding any taint which the Circuit Court felt may have existed with regard to Mayor Tate's appointments.

In the words of Judge Learned Hand:

> . . . [N]o court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who can therefore can have their day in court.

Alemite Manufacturing Corp. v. Staff, 42 F.2d 832 (2nd Cir., 1930); see also *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 437, 78 L.Ed. 894 (1934); *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9, 89 L.Ed. 661 (1944); *Krese v. General Steel Castings Corp.*, 179 F.2d 760, 763 (3rd Cir., 1950); *Swetland v. Curry*, 188 F.2d 841 (6 Cir. 1961).

Furthermore, since appointments to the Panel are personal, discretionary appointments of the individual Mayor, Mayor Rizzo's appointments are completely independent of former Mayor Tate's influence and may not be enjoined or otherwise directly effected by judicial action arising out of a case in which he was not involved. As this Court stated in *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13, 89 L.Ed. 667 (1944):

> The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.

The question of prospective injunctive relief, based on the actions of an outgoing executive official, applied to his successor in office, arose in the case of *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 179 F. Supp. 944 (1959). There, the plaintiffs alleged, inter alia, that the local District Attorney was enforcing Pennsylvania's "Sunday Closing Laws" discriminatorily. Plaintiff sought an order enjoining the enforcement of the laws. After noting that there was no factual basis for the issurance of such an injunction, the three judge court for the Eastern District of Pennsylvania stated at page 953 that, "The impracticality of such an anticipatory finding is made more obvious by the fact . . . that the term of office of the defendant as District Attorney expires at the end of the calendar year 1959." The three judge court decided this case on December 1, 1959. On appeal, this Court affirmed the three judge

court's reasoning in its refusal to exercise its injunctive powers, notwithstanding that the new District Attorney had been joined as an additional defendant, *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 588, 6 L.Ed. 2d 551 (1961). Mayor Rizzo, of course, has never been joined in the case at bar.

In the case of *Barton v. Eichelberger*, 451 F.2d 263 (1971), the Third Circuit Court of Appeals considered the propriety of the District Judge's dismissal of a class action for injunctive relief under the Civil Rights Act arising out of riots occuring in York, Pennsylvania. In affirming the denial of injunctive relief, the Third Circuit Court held at page 266:

> In light of the totality of the circumstances prevailing in the instant case, we cannot say that the District Court abused its discretion in denying the injunctive relief sought by plaintiffs.

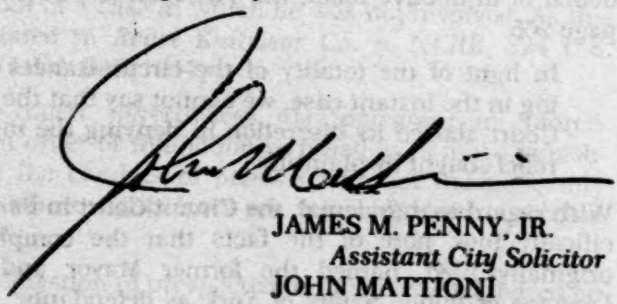
With regard to that denial, the Circuit Court in *Barton* specifically took note of the facts that the complaint, as originally filed, named the former Mayor and former Director of Public Safety of York as defendants; that the Mayor originally named as a defendant died after the complaint was filed and the new Mayor was substituted for him as a defendant, and that the new Mayor appointed a new Director of Public Safety who was also then substituted as a fefendant.

In the instant case, the Circuit Court showed no reluctance whatsoever in interfering, via an injunction, with the new Mayor's administration of City government, notwithstanding that the new Mayor is not a party to the action. It is therefore submitted that the Circuit Court was in error in ordering that an injunction be issued against Mayor Rizzo since Mayor Rizzo had not even been elected at the time of the evidentiary hearing in this matter, since the Circuit Court admits to a *total* dearth of evidence with regard to Mayor Rizzo, and since Mayor Rizzo is not now, nor was he ever a party to this action.

CONCLUSION

For the foregoing reasons, it is submitted that the Circuit Court of Appeals was in error in reversing the decision of the District Court. Petitioners, James H. J. Tate and the Educational Nominating Panel, respectfully request that this honorable Court reverse the decision of the Circuit Court and reinstate the Order of the District Court to dismiss the complaint to this action with prejudice.

Respectfully submitted,



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SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1264

MAYOR OF THE CITY OF PHILADELPHIA, et al.,
Petitioners

v.

EDUCATIONAL EQUALITY LEAGUE, et al.,
Respondents

BRIEF FOR RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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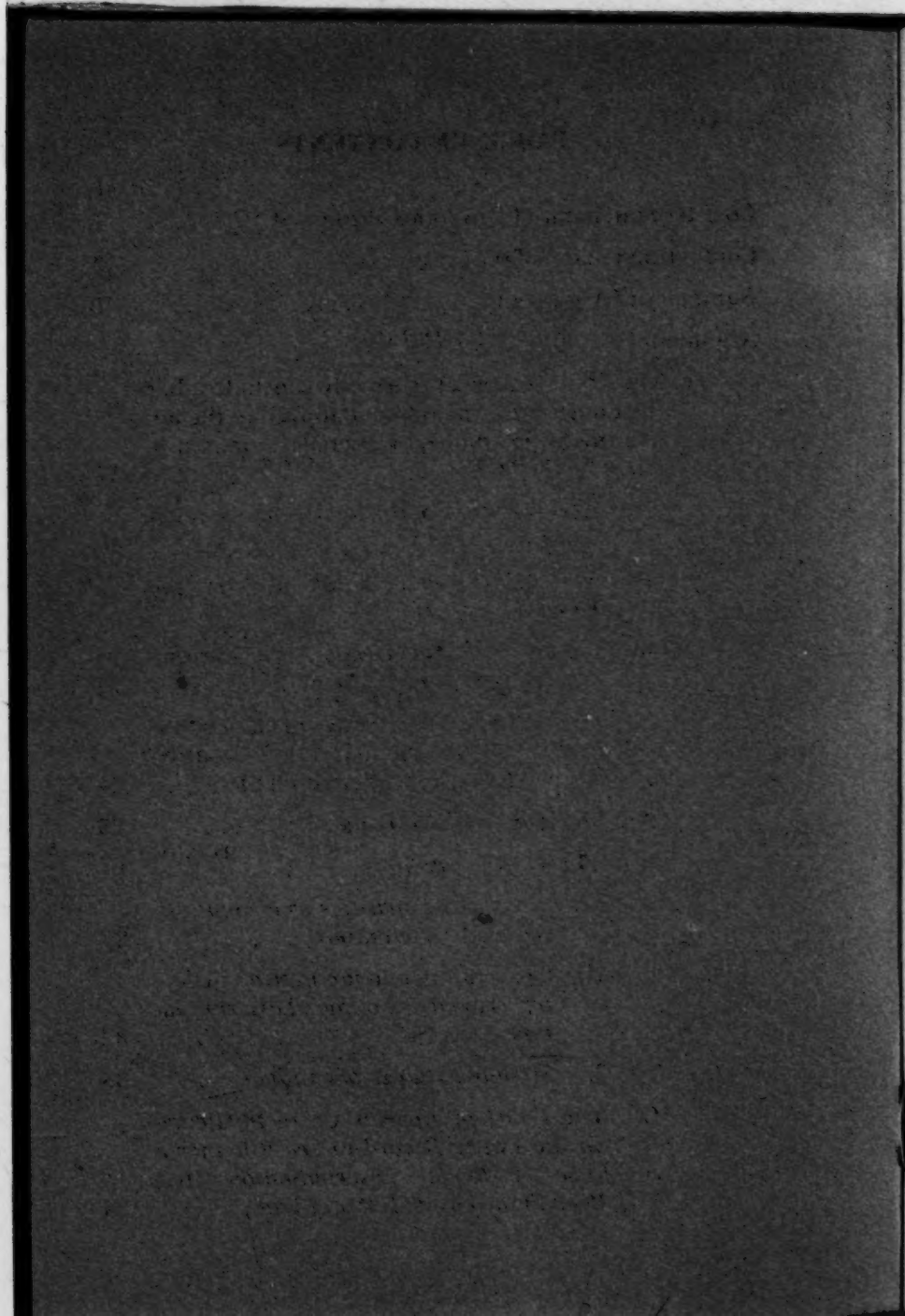

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Was the Court of Appeals wrong in concluding that the process for selecting the Philadelphia School Board members, set forth in detail by the Philadelphia City Charter, must be free from racial discrimination in conformity to the Fourteenth Amendment, even though members of a Nominating Panel and of the Board itself are, under state law, appointed by the chief executive officer of a city?

II. Having so held, did the Court of Appeals err in ruling that evidence of ignorance of the existence of black organizations which would qualify for the Panel under state law, and statistical evidence demonstrating consistent under-representation of blacks on the Nominating Panel, in combination with the other consistent evidence presented by the respondents, made out a prima facie case of discrimination in the selection of the panels?

III. If an injunction against discrimination were proper, does the District Court have the power to enforce it against the successor in office of one of the original defendants, if the evidence shows that the successor follows the same procedures as resulted in the previously discriminatory conduct, absent a showing that the individual has committed new acts of discrimination against respondents' class since assuming office?

COUNTER-STATEMENT OF THE CASE

The Selection of School Board Members in Philadelphia

Prior to 1965, the members of the Philadelphia Board of Education were appointed by the Judges of the City's Court of Common Pleas.[1] In 1964, a Citizens' Commission was appointed by Mayor James H. J. Tate, (the original defendant in this case) pursuant to legislative authority granted by the Commonwealth of Pennsylvania,[2] to develop an educational supplement to the City's Home Rule Charter.[3] The basic purpose of the Commission was to establish an independent school board in the City of Philadelphia.[4]

Because independence of the school board was a basic goal, the Commission devoted a major part of its time to finding a method of selecting the school board. As its minutes show, over several months, the Commission, with input from citizen groups and consultants from the nationally known Fels Institute of Local and State Government at the University of Pennsylvania, considered various ways of selecting the school board to assure that it was both independent and representative of the Philadelphia community, and that the method of its selection was thoroughly democratic.[5]

In the course of the Commission's deliberations, several alternative methods of selection were suggested.

1. 24 P. S. Section 3-302 (1949).

2. 53 P. S. Sections 13201-13223 (1963).

3. Eight of the nine members of the Commission were white.

4. A legislative history of the Supplement, consisting of the minutes of the Commission and materials considered by it, was introduced into the record by defendants and marked as D-5 and D-7.

"D" refers to defendants' exhibits which are part of the record, but not part of any printed appendices; "P" refers to plaintiffs' similar exhibits; "AA" refers to Appellants' Appendix in the Court of Appeals; "Pet." refers to pages in the Petition for Certiorari; "J" refers to the Joint Appendix in this Court.

5. D-5 and D-7.

These ranged from popular election of the members of the school board on the one hand to simple appointment by the Mayor on the other. The minutes of the meetings disclose a search for a middle ground.[6] Thus, there soon developed general agreement on the nominating panel mechanism. The members of the Panel were to be high ranking officers of organizations broadly described in the Charter document. The alternative of naming the organizations was rejected so that the membership could change in response to changes in the community.[7]

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6. These minutes are part of the record.

7. The Educational Supplement to the Philadelphia Home Rule Charter, Section 12-206, provides:

Educational Nominating Panel; Method of Selection.

(a) The Mayor shall appoint an Educational Nominating Panel consisting of thirteen (13) members. Members of the Panel shall be registered voters of the City and shall serve for terms of two years from the dates of their appointment.

(b) Nine members of the Educational Nominating Panel shall be the highest ranking officers of City-wide organizations or institutions which are, respectively:

(1) a labor union council or other organization of unions of workers and employees organized and operated for the benefit of such workers and employees,
(2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,
(3) a public school parent-teachers association,
(4) a community organization of citizens established for the purpose of improvement of public education,
(5) a federation, council, or other organization of non-partisan neighborhood or community organizations,
(6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,
(7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,
(8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and
(9) a council, association, or other organization dedicated to

One after the other, the members of the Commission expressed their views on the necessity that the nominating panel be representative and responsive.[8] The Fels Institute pointed out to the Commission that the "panel is a device essentially for limiting the discretion of the appointing authority."[9]

The Chairman's final summary to the members of the Commission, shortly before final approval of the proposed Supplement by the Commission, stated:

> "The Panel, in effect, is and should be a substitute or counterpart of popular election. . . . It follows that the Panel's composition should be so arranged in the Charter that it can always constitute a balanced representation or cross section of the entire com-

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Note 7—(*Continued*)

community planning of health and welfare services or of the physical resources and environment of the City.

(c) In order to represent adequately the entire community, the four other members of the Educational Nominating Panel shall be appointed by the Mayor from the citizenry at large.

(d) In the event no organization as described in one of the clauses (1) through (9) of subsection (b) exists within the City, or in the event there is no such organization any one of whose officers is a registered voter of the City, the Mayor shall appoint the highest ranking officer who is a registered voter of the City from another organization or institution which qualifies under another clause of the subsection.

(e) A vacancy in the office of member of the Educational Nominating Panel shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died, resigned, or was removed.

(f) The Educational Nominating Panel shall elect its own officers and adopt rules of procedure.

8. Defendants' exhibits 5u and 5v, minutes of Commission meetings in November and December, 1964, record the Chairman, Mr. Nesbitt, Dr. Breslow, Dr. Zahn, Mr. Wolf, Mr. Goldman, Mrs. Anderson, and General LaBrum (then President of the School Board) all expressing the firm view that the Panel was the principal device for assuring the independence and responsiveness of the new School Board.

9. D-7(d), p. 5.

munity—all of the community's ethnic, racial, economic, or geographic elements and segments."[10]

The Supplement was approved by the voters of the City of Philadelphia on May 18, 1965. Shortly thereafter, pursuant to its terms, the Mayor of Philadelphia appointed the first thirteen members of the Educational Nominating Panel. Of these, ten were white, and three were black. The second Panel, appointed in 1967, consisted of eleven whites and two blacks. The third Panel, in 1969, consisted of twelve whites and one black. Finally, on May 28, 1971, Mayor Tate appointed the fourth Panel, consisting of twleve whites and one black.[11] The 1970 census found that approximately 34% of the city's population was black.[12]

As the legislative history entered in the record makes clear, the definitions in the Supplement were designed by the Commission to point to organizations existing at the time the Supplement was enacted; they were specifically written, however, in such a way as to assure responsive change over a period of time. Nonetheless, as a practical matter, the Mayor's office regarded the reappointment of the organizations which originally constituted the 1965 Panel to be a matter of routine.[13]

The Complaint in this Case

About two months after the 1971 Panel was appointed, and before it had made any nominations, a class action was brought by the Educational Equality League, by three black civic leaders and by two black school children on behalf of

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10. D-7(x), AA-15a.

11. J24a. Subsequently, it appeared that one of the white appointees to the 1971 Panel no longer was the chief executive officer of the organization he was selected to represent, and the correct person, a black, was appointed to the Panel.

12. *See, Educational Equality League v. Tate*, 333 F. Supp. 1202, 1203-4 (E.D.Pa. 1971), (Findings of Fact Nos. 1-8).

13. J53a, 61a, 70a, *et seq.*

all black citizens of Philadelphia.[14] The suit was brought under 28 U.S.C. Section 1343(3) alleging violation of the Fourteenth Amendment by the Mayor of Philadelphia, in that he discriminated on the basis of race in his appointments to the Educational Nominating Panel in 1971. The plaintiffs sought a judgment declaring that the Mayor had discriminated on the basis of race in the appointments, an injunction against the Panel as then constituted to prevent it from acting, as well as an order directing the Mayor to appoint a new Panel, one "that is fairly representative of the racial composition of the school community."[15]

Plaintiffs have never sought and do not now seek relief in the nature of mandamus directing the appointment of any particular number of blacks to the Panel.

The Evidence in this Case

At trial, the plaintiffs presented evidence relating to discrimination in the appointment of the Nominating Panel, as well as evidence showing a broad pattern of discrimination in public appointments and employment in Philadelphia.

First, plaintiffs showed the racial composition of the panels appointed by the Mayor in 1965, 1967, 1969, and 1971, along with the designation of the organizations which the individuals represented. This was compared to the population of the City of Philadelphia, which was approximately 34% black, and the population of the schools of Phila-

14. The Educational Equality League is a non-profit corporation which has been engaged for nearly forty years in pursuing equal educational opportunity for black children in the Philadelphia school system. One of the plaintiffs, Mr. Floyd Logan, is its President; the second civic leader was designated the Outstanding Young Leader of Philadelphia by the Junior Chamber of Commerce; the third civic leader is a member of the Pennsylvania Human Relations Commission. The suit was certified as a class action by the District Court. 333 F. Supp. 1202 (E.D.Pa. 1971).

15. Complaint, p. 8.

delphia, which was over 60% black.[16] Second, evidence was introduced showing that the Pennsylvania Human Relations Commission had found that the Philadelphia Schools were racially segregated in violation of the Pennsylvania Human Relations Act,[17] that the Philadelphia School Board was resisting orders by the Commission to redress the segregation,[18] and that there was a statistical pattern of racial imbalance in teaching and administrative positions in the school district.[19]

Third, plaintiffs introduced undisputed evidence showing patterns of appointments and employment by Mayor Tate.[20] This evidence showed that:

a. Tate had appointed 341 whites and 47 blacks (12%) to Boards and Commissions pursuant to the Home Rule Charter;[21]

b. Tate had appointed 83 whites and 9 blacks (9%) to civil service exempt positions with salaries in excess of $15,000 per year;

c. Civil service appointments to positions with salaries in excess of $15,000 a year, carried out under the supervision of the City Personnel Director, (responsible to the Mayor under the City Home Rule Charter) were 742 whites and 49 blacks (6%).[22]

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16. See footnote 12, *supra*.

17. P-1.

18. P-1, p. 12.

19. P-3.

20. J14a-23a, 122a.

21. Particularly noteworthy was the fact that Tate had appointed 62 whites and 6 blacks to Boards and Commissions related to education.

22. These patterns of under-representation of blacks are consistent with several court decisions issued in Philadelphia, at the instance of black citizens, to protect their rights under federal law. *Butcher v. Rizzo*, 317 F. Supp. 899 (E.D. Pa. 1970) (black plaintiffs granted relief against being used as fillers in lineups against their will); *Goode v. Tate*, Civ. A. No. 70-491 (E.D. Pa. 1973) (black plaintiffs granted relief for systematic misconduct by two

Finally, plaintiffs presented testimony by plaintiff W. Wilson Goode, who focused on several important areas:

Goode first listed organizations active in the black community which met the definitions in Section 12-206(b)

Note 22—(*Continued*)

policemen); *Alexander v. Rizzo*, Civ. A. No. 70-992 (E.D. Pa. 1973) (black plaintiffs obtained consent order against dragnet interrogations); *Commonwealth of Pennsylvania et al., v. O'Neill, et al.*, 348 F. Supp. 1084 (E.D. Pa. 1972) (black plaintiffs granted relief from racially discriminatory hiring practices in Philadelphia Police Department); *Black v. Rizzo*, Civ. A. No. 72-1781 (E.D. Pa. 1973) (black plaintiff granted relief from racially discriminatory employment practices in Philadelphia Fire Department); *Jackson v. Hendrick*, (Common Pleas), Civ. A. No. 72-2437 (1972) (black plaintiffs granted injunction against cruel and unusual punishment in Philadelphia city prisons); *Nicholson v. Pittenger*, Civ. A. No. 72-1596 (E.D. Pa. 1973) (order entered enjoining expenditure of $20 Million of federal funds for low income children by School District because of violation of federal guidelines designed to assure proper expenditure of funds); *Shannon v. H. U. D.*, 436 F.2d 809 (3rd Cir. 1970) (racial discrimination in violation of 1968 Civil Rights Act found in site selection of city planned federally subsidized housing); *Germantown Community Council v. H. U. D.*, Civ. A. No. 69-2426 (E.D. Pa. 1969) (preliminary injunction presently in force against construction of city planned highway which would isolate black community); *Washington Square West Project Area Committee v. H. U. D.*, Civ. A. No. 69-2972 (E.D. Pa. 1969) (preliminary injunction entered to prevent city Redevelopment Authority from using all-white citizens' group to evict black low income residents without construction of replacement housing); *Residents Advisory Board v. Philadelphia Housing Authority*, Civ. A. No. 72-2399 (E.D. Pa. 1972) (predominantly black plaintiffs successfully enjoined unfair tenants' election and in related case, prevented closing of day care center on basis of stipulation, Civ. A. No. 72-2098) (E.D. Pa. 1972); *Johnson v. Menna*, (Common Pleas), Civ. A. No. 663 (March Term 1973) (injunction issued on behalf of sole black candidate in special election to redraw voting instructions); *Brown v. Philadelphia Housing Authority*, Civ. A. No. 72-2083 (E.D. Pa. 1972) (temporary restraining order granted in class action on behalf of public housing residents threatened with mass evictions). *See also*, the numerous free speech decisions issued over the past several years: *Resistance v. Commissioners of Fairmount Park*, Civ. A. No. 69-819 (E.D. Pa.) (injunction issued to allow peace rally); *Leslie Tobin Imports v. Rizzo*, 305 F. Supp. 1135 (E.D. Pa. 1969)

of the Supplement.[23] His testimony established that there were such organizations which met the definitions in seven of the nine categories. This testimony was uncontested and formed the basis of the Findings of Fact by the District Court.[24]

Goode further testified that the organizations appointed to the Panel in 1969 were changed from those previously appointed, and he explained the circumstances of the change.[25] He stated that, in early 1969, individuals active in the black community attempted to convince the Mayor to appoint an additional black to the School Board. According to Goode, when the 1967 Panel, which was still in operation at that time, made its recommendations to the Mayor for an existing vacancy, two of the three names submitted to the Mayor were blacks. Goode testified that the Mayor made a public statement that he was not going to appoint any more blacks to the Board of Education, and he characterized the Mayor's response to the nominees of the 1967 Panel as an angry one. Goode explained that soon thereafter the term of the 1967 Panel ended, and when the 1969 Panel was appointed, representatives of five new or-

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(injunction issued to prevent seizure of allegedly obscene material); *Hughes v. Rizzo*, 282 F.2d 881 (3rd Cir. 1968) (preliminary injunction upheld against roundups of "hippies"); *Peace, Inc. v. Philadelphia*, Civ. A. No. 70-2101 (E.D. Pa. 1970) (injunction issued to allow concert in Municipal Stadium); *Friends Peace Committee v. O'Neill*, Civ. A. No. 72-992 (E.D.Pa. 1972) (consent decree entered allowing demonstrations in public places); *Free Press, Inc. v. Rizzo*, Civ. A. No. 70-3175 (E.D.Pa. 1972) (preliminary injunction entered by consent not to interfere with reporters at public events); *Farber v. Rizzo*, Civ. A. No. 72-2052 (E.D.Pa. 1972) (injunction entered prohibiting interference with peaceful picketing of President; Police Chief presently in contempt for violation of order of Judge Huyett).

23. J33a-36a.

24. 333 F. Supp. at 1204.

25. J40a-41a.

ganizations were appointed to the Panel.[26] He was not cross-examined on any of this testimony, and defendants at no time either objected to his testimony or introduced any evidence which was related to it.

Plaintiffs presented the testimony of another black civic leader, and of several black students in the public schools and then rested.

At defendants' request, the case reconvened several days later, to allow them to present evidence.[27] Defendants' principal witness was Anthony Zecca, who testified that he had been deputy to the Mayor since 1963. Zecca stated that he had been asked as usual by the Mayor to prepare the list for the 1971 Panel. On cross-examination, Mr. Zecca admitted that he was unaware of the existence of the organizations active in the black community, described by Mr. Goode, which met the definitions in the Supplement, and therefore had not considered them for membership on the Panel. He also stated that reselection of the organizations previously on the Panel was "routine."[28]

Following Mr. Zecca's testimony, and the testimony of some members of the Educational Nominating Panel, the defendants called Clarence Farmer, the Chairman of the Philadelphia Commission on Human Relations, appointed by the Mayor. Mr. Farmer testified that approximately 41% of the employees in civil service positions in the City of Philadelphia were blacks, and that this was much higher than ten years previously.[29] Specifically, Mr. Farmer testified that "in the last four years, in the last ten years, there has been a tremendous mark of improvement among

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26. The fact that five new organizations were appointed, which was stipulated, was contrary to subsequent testimony by Deputy Mayor Zecca that reappointment of the organization was generally the normal course of events; he used the word "routine." J53a, 61a, 70a, *et seq.*

27. Defendants apparently had intended to present no testimony, but did so in response to a suggestion of the trial judge.

28. J53a, 61a, 70a, *et seq.*

29. J98a.

blacks, the representation that blacks have had in key positions in the City government, and I think that much of this can be attributed to Mayor Tate and his leadership of the City government."[30]

On cross-examination, Farmer was asked about a study done by the Commission on Human Relations of employment by race by the City government. Although Farmer acknowledged that such a study had been done under his direction, and initially promised to produce it since it was "public information,"[31] the City later interposed the defense of "confidentiality" and objected to its production. Nonetheless, the District Court directed that those parts of the study that were relevant to Mr. Farmer's testimony were to be made part of the record.[32]

The study concluded that, quite opposed to Mr. Farmer's testimony, "admirable as these goals might have been, they apparently have had the unfortunate effect of perpetuating results of past discrimination, so many of the departments have a black workforce with predominantly white superiors and administrative staff. . . . This general approach has been shortsighted and has contributed to the increasing economic gap between black and Puerto Rican citizens and a majority of white citizens."[33]

The District Court's Opinion in this Case

On the above record, the District Court issued its Opinion on November 8, 1971, several days after the election of Mayor Rizzo to succeed Mayor Tate, and before

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30. J100a.

31. J101a.

32. J2a. Order of October 1, 1971. Although by clerical oversight, none of the document itself actually appears in the record, it is referred to in pleadings, which are all part of the record, as well as respondents' brief in the Court of Appeals.

33. "City Employees Study," prepared by the Philadelphia Commission on Human Relations, p. 10 (Sept., 1970).

Mayor Tate had made any new appointments to the School Board.[34]

The District Court made findings concerning the appointments to the Nominating Panel set forth above, as well as to the population of the City of Philadelphia and the City's schools. The Court also made findings on the undisputed racial imbalance in appointments by the Mayor. Then, in particularly important findings, the Court concluded, in Finding No. 16, that "there are several organizations reflecting the views and participation of the black community which could qualify under subsections 1, 2, 3, 4, 5, 6, and 9 of Section 12-206(b), seven of the nine numerated classes." And, in Finding No. 17, the District Court found that Deputy Mayor Anthony Zecca "was unaware of the existence of many of these black organizations."[35] The Court also found that the Supplement itself had been violated in making the 1971 appointments.[36]

Despite these findings, the District Court dismissed the Complaint. The basis of its decision was that the broad numerical analysis frequently used in racial discrimination cases could not be applied to this case because the Educational Nominating Panel consisted only of thirteen people, and that this number was insufficient to render statistics meaningful as an indicator of racial discrimination.[37]

The Court also concluded that since plaintiffs could not prove their case by statistical evidence, in order to prevail, they had to show direct proof of intentional discrimination. The Court stated in its Opinion that the only direct proof offered by the plaintiffs was a newspaper article allegedly quoting the Mayor, which the Court dismissed as inadmissible hearsay.[38]

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34. Mayor Tate's 1971 appointments to the School Board were announced by press release on November 11, 1971.

35. 333 F. Supp. at 1204.

36. 333 F. Supp. at 1204.

37. 333 F. Supp. at 1206.

38. 333 F. Supp. at 1206. For reasons which were not stated, the Court also declined to exercise pendent jurisdiction over the

The Court of Appeals' Opinion in this Case

Plaintiffs immediately appealed to the United States Court of Appeals for the Third Circuit, which, on January 11, 1973, reversed the District Court.[39] The Court of Appeals explored the legislative history of the Supplement which was part of the record and reviewed all the testimony which had been presented.

In expressing its view of the case, the Court of Appeals first recognized that plaintiffs did not seek to establish any sort of racial quota for membership to the Panel, but asked only that the Mayor of Philadelphia not exclude blacks from proper consideration when making appointments to the Panel.[40] The Court then dealt summarily with the City's argument that the action of the Mayor in appointing the Nominating Panel was beyond the reach of the Fourteenth Amendment by stating that it was "clear from the language of the Educational Supplement and from the legislative history" that the Panel was not intended to operate as part of the staff of the Mayor.[41]

The Court of Appeals then considered the evidence to determine whether plaintiffs had successfully made out a prima facie case of discrimination against blacks. The Court articulated the classic rationale of the Fourteenth Amendment used by this Court in *Strauder v. West Virginia*, 100 U.S. 303, 307-8 (1880), reiterated recently in *Turner v. Fouche*, 396 U.S. 346 (1970) and *Alexander v. Louisiana*, 405 U.S. 625 (1972), and applied in the Third Circuit's own recent holding in *Smith v. Yeager*, 465 F.2d 272 (3rd Cir. 1972), *cert. denied, sub nom.* New Jersey v. Smith, 409 U.S. 1076 (1972).[42] This approach holds that

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case, even though it had found that there had been violations of the Supplement in several appointments. 333 F. Supp. at 1207.

39. The decision is reported at 472 F.2d 612.

40. 472 F.2d at 616.

41. 472 F.2d at 617.

42. The Court of Appeals noted that both *Alexander* and *Smith* had been decided after the District Court's decision in this case.

plaintiffs need not show a deliberate practice of discrimination but that they need only demonstrate that blacks were under-represented, and that there was an opportunity for racial discrimination. The Court also stated that ignorance of the existence of qualified black organizations on the part of the selector, in this case, Mr. Zecca, had considerable importance.[43]

The Court cited the findings filed by the District Court, which established that the opportunity for discrimination could not be denied, and that the person selecting the organizations was, in fact, ignorant of the existence of the black organizations, representatives of which could have been appointed under the terms of the Supplement. The Court concluded that the record as a whole, carefully analyzed, made out a prima facie case of discrimination, and the affirmations of good faith by Mr. Zecca and the members of the Nominating Panel were insufficient to rebut plaintiffs' case.[44] The Court of Appeals also noted that, contrary to the District Court's findings, Mr. Goode had testified "without contradiction or objection" about the circumstances of the appointment of the 1969 Panel.[45]

Finally, the Court stated that the precise nature of relief to which plaintiffs would be entitled was the responsibility of the District Court. The Court directed the District Court to issue a declaratory judgment in favor of plaintiffs, and also suggested that since, on the basis of the record before it at the time, Mr. Zecca continued as Deputy Mayor, an injunction to prevent future discrimination would be appropriate, even though Mayor Tate had been succeeded by Mayor Rizzo.[46]

Thereupon, the City sought a Petition for Certiorari, which was granted by this Court.[47]

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43. 472 F.2d at 617-18.
44. 472 F.2d at 618.
45. 472 F.2d at 616.
46. 472 F.2d at 618-19.
47. 93 S. Ct. 2149 (1973).

SUMMARY OF ARGUMENT

I. This is a case in which the chief executive officer of the City of Philadelphia has been found by the Court of Appeals for the Third Circuit to have engaged in racially discriminatory conduct in violation of the Fourteenth Amendment. This is not a case involving executive discretion. The Court of Appeals correctly found that Philadelphia had established a detailed mechanism, explained by an extensive legislative history, whereby a Nominating Panel was to perform a governmental function in participating in the selection process of the Philadelphia School Board. Because of the nature of the Panel, therefore, this Court need not reach the issue reserved in *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970), and decide whether and to what extent the federal courts can apply the requirements of the Equal Protection Clause of the Fourteenth Amendment to racial discrimination by a state executive acting pursuant to purely discretionary authority. Rather, this is a case, as the Court of Appeals correctly found, for the straightforward application of traditional legal principles used to determine whether racial discrimination had been proven. *Turner v. Fouche*, 396 U.S. 346 (1970); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Smith v. Yeager*, 465 F.2d 272 (3d Cir. 1972), *cert. den. sub. nom.* New Jersey v. Smith, 409 U.S. 1076 (1972).

II. The Court of Appeals correctly decided that it must examine the entire record in the case in order to determine as a matter of law whether a prima facie case of racial discrimination had been made out. Further, in concluding that respondents had proved such a case, the Court correctly relied on the fact that Mr. Zecca did not consider possible black appointments, and on the kind of indirect evidence which has uniformly been received by lower courts in cases involving racial discrimination, and which has specifically been approved by this Court in *Turner v. Fouche, supra; McDonnell-Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973);

and *Keyes v. School District No. 1, Denver, Colorado*, 93 S. Ct. 2686 (1973).

III. The Court of Appeals Opinion specifically held that it was the District Court's responsibility to determine the nature of injunctive relief. This Court need not consider whether the allegations in Petitioners' Brief that additional testimony regarding new duties of Mr. Zecca or a different approach to the appointing process by the new Mayor would eliminate the need for injunctive relief, since that matter will be determined by the District Court following the evidentiary hearing contemplated by the Opinion of the Court of Appeals. At that time, the District Court will exercise the broad discretion entrusted to it to deal with violations of the Fourteenth Amendment, *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971), in the light of the facts as it finds them to be at that time. Moreover, since the Mayor was sued in his official capacity, any injunction would automatically apply to his successor in office unless evidence were introduced to show that it should not, a result entirely consistent with the Court of Appeals' Opinion.

ARGUMENT

I. The Court of Appeals correctly concluded that the Fourteenth Amendment applied to the appointment of the Educational Nominating Panel by the Mayor.

The facts in this case do not involve the discretion of a chief executive to choose his personal staff, nor to make the broad range of patronage appointments normally available to an executive. This case involves carefully circumscribed decision-making by an executive pursuant to a comprehensive statutory mechansim for the selection of a school board, in which the executive failed to consider through ignorance the possibility of appointing qualified blacks. Racial discrimination in that decision making process is simply illegal.[48]

The Fourteenth Amendment provides:

> "No state shall deny to any person . . . the equal protection of the laws."

This Court is fully cognizant of the initial purpose of the Amendment: to provide a constitutional basis for Reconstruction legislation which was found to be necessary because of extensive evidence presented to the Congress that the Freedmen, emancipated by the Thirteenth Amendment, were suffering grievous disabilities at the hands of state and local officials. The Black Codes had saddled blacks with "onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value."[49]

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48. *Carter v. Jury Commission of Greene County*, 396 U.S. 326 (1970); *Turner v. Fouche, supra; Whitus v. Georgia*, 385 U.S. 547 (1967); *Lyons v. School Committee of the City of Boston*, Civ. A. No. 73-1150 (1st Cir. June 29, 1973); *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill., 1969).

49. *Slaughterhouse Cases*, 83 U.S. (16 Wall) 36, 70 (1873), cited in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426, (1968), and sources cited therein.

This Court recently stated, in a case involving the appointment process for school board members, that the Fourteenth Amendment created "a right to be considered for public service without the burden of discriminatory qualifications."[50] Thus, in the context of this case, the Fourteenth Amendment extended to the Freedmen, and to blacks today, the right to recourse to the federal courts, which are then bound to remove any remaining "badges of slavery" brought about by state action.[51] Although Philadelphia need not have chosen the Nominating Panel mechanism for selecting its School Board, "it must hew to federal constitutional criteria in ensuring that the selection of membership is free of racial bias."[52]

Petitioners seek to engraft an exception to that rule, an exception which would hold that a state executive retains an area of discretionary appointments which need not meet the generally accepted standards of the Equal Protection Clause. Whether such an exception is viable in the context of the Fourteenth Amendment will not be decided in the abstract, however, and because this case depends on its own particular factual situation, need not be decided here. The Mayor's appointment power here is clearly circumscribed by state law, and thus constitutionally invalid criteria cannot be superimposed thereon.[53]

A. *General Scope of the Fourteenth Amendment*

First, it is useful to recall certain precedents of this Court which set the guideposts for the inquiry in this case.

It is clear that a state "may act authoritatively through its executive as through its legislative body."[54] And, what-

50. *Turner v. Fouche*, *supra* at 362. *See also Carter v. Jury Commission of Greene Co.*, *supra* at 330.

51. *Jones v. Alfred H. Mayer Co.*, *supra* at 414.

52. *Carter v. Jury Commission of Greene County*, *supra*, at 330.

53. *Turner v. Fouche*, *supra* at 362-3.

54. *Lombard v. Louisiana*, 373 U.S. 267, 278 (1963). *See also, e.g., N.A.A.C.P. v. Thompson*, 357 F.2d 831 (5th Cir. 1966).

ever other purposes the Fourteenth Amendment might have had, its "central purpose . . . was to eliminate racial discrimination emanating from official sources in the States."[55]

This Court has also held, of course, that the Constitution will restrict the normally discretionary act of drawing municipal or legislative boundaries where the result is gerrymandering to disfranchise black voters and to prevent blacks from being elected to municipal office.[56] Even legislative matters may be within the ambit of the Fourteenth Amendment protection where racial discrimination is involved. This Court assumed in *Bond v. Floyd*, 385 U.S. 116, 130-131 (1966), that a state legislature may not exclude an otherwise qualified member because of his race and color.[57]

Effectuation of the Fourteenth Amendment's prohibitions against racial discrimination is also appropriate, of course, where the subject matter of the case is employment. Even though no person has a right to public employment, a state has no right to forbid employment to any person on account of race,[58] and such employment discrimination violates the Constitution and is actionable under the civil rights laws.[59] Nor may a state contract with employers known to discriminate.[60] A decision against Mayor Tate and Mayor Rizzo, among others, finding them responsible for discrimination on the basis of race in appointments to

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55. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

56. *White v. Regester*, 93 S. Ct. 2332 (1972); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

57. Cf. *Powell v. McCormack*, 395 U.S. 486 (1969).

58. *Colorado Anti-Discrimination Commission v. Continental Airlines*, 372 U.S. 714, 721 (1963).

59. *Todd v. Joint Apprenticeship Committee*, 223 F. Supp. 12 (N.D. Ill. 1963), *remanded with instructions to dismiss as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1964).

60. *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967).

the Philadelphia Police Department was recently affirmed *en banc* by the Court of Appeals for the Third Circuit.[61]

Nor can an executive deny *appointive* public office to any person or group of persons on account of his or their race or color. This Court has declared unconstitutional exclusion of blacks from jury services,[62] and discriminatory assignments of black teachers.[63] And, although highly discretionary, the discriminatory appointment of members of a local draft board has been judicially condemned.[64]

In fact, there is no case in this century in which this Court has held that proven racial discrimination by a state official does not violate the Fourteenth Amendment.

B. *The Educational Supplement to the Home Rule Charter*

The Educational Supplement created a very specific and narrow mechanism for choosing members of the Philadelphia School Board. It was based on extensive discussion by the Commission which drafted it, and subjected to intense public scrutiny. Moreover, the mechanism was intended to perform a representative and democratic function.

In establishing this mechansim, Philadelphia could not have barred black participation,[65] nor probably could

61. *Commonwealth of Pennsylvania, et al., v. O'Neill, et al.*, 473 F.2d 1029 (3rd Cir. 1973), *affirming in part, reversing in part*, 348 F. Supp. 1084 (E.D. Pa. 1972).

62. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

63. *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969); *Bradley v. School Board of the City of Richmond*, 382 U.S. 103 (1965); *see also, Clark v. Board of Education of the Little Rock District*, 426 F.2d 1035 (8th Cir. 1970); *Haney v. County Board of Education of Sevier County*, 429 F.2d 364 (8th Cir. 1970).

64. *Clay v. United States*, 397 F.2d 901, 911 (5th Cir. 1968) (dictum), *vacated on other grounds sub nom.*, Giordano v. United States, 394 U.S. 310 (1969); *Sellers v. McNamara*, 398 F.2d 893, 895 (5th Cir. 1968) (sep. opinion of Judge Tuttle), *cert. denied, sub nom.*, Sellers v. Laird, 395 U.S. 950 (1969).

65. *Smith v. Allwright*, 321 U.S. 649 (1944).

it have designated black positions.[66] It is equally clear that Philadelphia cannot operate this mechanism in a racially discriminatory manner.

The Court of Appeals agreed with this analysis, based on its examination of the legislative history of the Supplement. The cases decided by this Court upon which the Court of Appeals relied were the jury cases, *Turner v. Fouche*, 396 U.S. 346 (1970), and *Alexander v. Louisiana*, 405 U.S. 625 (1972). The Court of Appeals observed that juries were required to be a cross-section of the community, and held that the Supplement required that the Nominating Panel was to be the same.[67] The language of the Chairman of the drafting Commission, to the effect that the Panel should function as a counterpart of popular election, recalls the language of the District Court on remand in *Turner v. Fouche:*

> "The selection of the school board members by the grand jury is tantamount to an election from the standpoint of political representation under a representative form of government." Civ. A. No. 1357 (S.D. Georgia, May 6, 1970) (unreported opinion, p. 2).

In fact, as the Court of Appeals found, the Panel plays a governmental role in the Philadelphia school system analogous to the grand jury in *Turner v. Fouche*. Since *Brown v. Board of Education*, 347 U.S. 483 (1954), there has been no place for racial discrimination in any part of a public school system.

Thus, not only does this case not involve discretion, but the facts found by the District Court, which showed that the mandates of the Supplement itself were violated, emphasize the extent to which the legislative intent was to have the selection process act as a mechansim of accountability in precisely the manner plaintiffs are urging.

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66. *See, e.g., Anderson v. Martin*, 375 U.S. 399 (1964).

67. *See Carter v. Jury Commission of Greene County, supra*, at 330, citing *Smith v. Texas*, 311 U.S. at 130.

If the Mayor is limited by the Supplement, in that he must satisfy the requirements of Section 12-206 in his appointments, there can be no possible reason to suggest that he is not circumscribed by the Fourteenth Amendment; since he has only limited discretion under state law, he can only have limited discretion under the Fourteenth Amendment. Moreover, the mandate to the Mayor, repeatedly emphasized through the legislative history, is to make the Panel representative of the community. The failure to meet that statutory objective by failing through ignorance even to consider eligible blacks, at least justifies the strict scrutiny usually given to situations of apparent racial bias violating the Fourteenth Amendment.[68]

C. *Carter v. Jury Commission of Greene County*

Of course, petitioners' arguments about separation of powers and the cases they cite are totally irrelevant to this case.[69] The soundness of the principle of executive and administrative discretion, and its insulation from judicial review as long as it is consistent with law, needs no defense or elaboration. It need only be noted in passing that the principle simply does not apply where allegations of racial discrimination have been made, or even to allegations of violations of due process. In such circumstances, a full examination of the merits of the constitutional claim is required, since no executive has the discretion to violate the Constitution which he has sworn to uphold.[70]

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68. *See Mitchell v. Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966).

69. The citation in support of that proposition, *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45 (1971), is especially peculiar since, in that case, the Pennsylvania Supreme Court interfered in an unprecedented way with what had long been thought to be unreviewable executive discretion by ordering the Mayor of Philadelphia to provide funds for the operation of the Philadelphia courts.

70. *See, e.g., Dugan v. Rank*, 372 U.S. 609 (1963), *Greene v. McElroy*, 360 U.S. 474 (1959).

A somewhat different problem is raised, however, by *Carter v. Jury Commission of Greene County*, *supra*, decided the same day as *Turner v. Fouche*, *supra*. In that case, Mr. Justice Stewart, for the Court, suggested that there might be some problem in ordering the governor of a state to appoint a black jury commissioner. 396 U.S. at 338. Obviously, there are many basic problems of federalism to be resolved before such an order could be entered. *Carter*, however, was decided on the grounds that there was inadequate proof of discrimination and thus the question of remedy was not reached. But several aspects of *Carter* deserve comment here in support of the argument that it creates no impediment in this case either to a finding of discrimination or to an order invalidating the unconstitutional appointments.

First, the *Carter* opinion, and even Mr. Justice Black's concurrence, raised questions only about the extent of the *remedy* a federal court could impose if it found discrimination. There was no hint that a finding of a violation of the Fourteenth Amendment by the governor appointing the jury commission was beyond the power of the federal court, even though the Alabama Statute, pursuant to which the Governor acted, allowed him virtually total discretion in the appointments. See Ala. Code, Tit. 30, Section 9.

Second, the breadth of discretion in *Carter* emphasizes the inappropriateness of the Petitioners' argument in the context of a statute granting the Mayor only a narrow range of discretion. In this case, the statute does not create a cloak of discretion behind which the Mayor can hide to avoid a just claim under the Fourteenth Amendment.

Third, in *Carter*, plaintiff sought an order directing the appointment of a black jury commissioner. In the instant case, plaintiffs sought adherence to the mandate of the Equal Protection Clause and to the command of the Supplement itself that the community be adequately represented. Plaintiffs sought only a remedy conceptually granted by the District Court, and approved by this Court in *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971),

a process which remedied the equal protection violation. In actuality, of course, the remedy sought here is even less: a process from which racial discrimination is absent; the remedy sought here is not a specific proportion or number of blacks, as was ordered in *Swann*.

Finally, of course, *Carter* as actual precedent is inappropriate because it held that there was a complete absence of proof of discrimination.[71]

In summary, there is absolutely no precedent for the proposition that a state official has discretion to violate the Equal Protection Clause, particularly where he is operating pursuant to a mandatory statute, and where the evidence shows he did not take normal steps to assure proper consideration of appointment of blacks. The Court of Appeals was, therefore, correct in dismissing the argument out of hand. As for Petitioners' argument that plaintiffs have an adequate remedy at the ballot box, Judge Gibbons at oral argument in the Court of Appeals acknowledged the Madisonian source of the position, but observed, "it has not been the black experience in America."[72] And, of course, the entire line of Fourteenth Amendment cases stands also as a rebuttal.

II. The Court of Appeals correctly concluded that the entire record made out an unrebutted prima facie case of racial discrimination.

Once it had concluded that the Fourteenth Amendment applied to the appointment of the Nominating Panel, the Court of Appeals reviewed the Findings of Fact, and the entire record in the District Court, and concluded as a

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71. *See also, Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Clay v. United States*, 397 F.2d 901 (5th Cir. 1968) (dictum) *vacated on other grounds sub nom.* United States v. Giordano, 394 U.S. 310 (1969). Compare *White v. Regester, supra.*

72. *See also, United States v. Carolene Products Co.*, 304 U.S. 152, n.4 (1938); *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278, 1294 (1973).

matter of law that the record demonstrated an unrebutted prima facie case of racial discrimination. In so doing, it was carrying out its proper appellate function and it correctly applied well established legal standards.

A. *The Appellate Function*

The question of whether racial discrimination occurred in the appointment process of the Nominating Panel is, as Petitioners argue, the ultimate question of fact. But the reversal by the Court of Appeals of the District Court's finding of no discrimination was not in the nature of a disregard of a finding of fact, correctly barred by Rule 52(a). Rather, the determination by the Court of Appeals was a legal one: that is, the facts found by the District Court, as a matter of law, made out a prima facie case of racial discrimination. This legal judgment by the Court of Appeals was obviously within its competence, and in no way violated Rule 52(a).

In the earliest of the jury cases, *Norris v. Alabama*, 294 U.S. 587 (1935), this Court reviewed the facts as found by the lower courts and reversed the finding of no discrimination, holding that a claim of good faith was simply not a legal defense to proven discrimination. The Court of Appeals here performed the same function.

To call this judgment a factual one, as Petitioners do, and allege that it is in violation of Rule 52(a), is to ignore the subtle difficulties involved in questions of mixed law and fact, exploration of which is beloved of law schools, but thorough understanding of which has been reached by this Court, particularly in cases raising questions of Fourteenth Amendment violations. *Keyes* and numerous other cases make clear that it was not merely proper, but it was obligatory for the Court of Appeals to render a judgment on whether the facts in this case constituted a prima facie case of discrimination as a matter of law.

B. *The Legal Standard*

To the lay mind, and to state officials accused of racial discrimination, the charge almost invariably connotes intentional discrimination. But from the point of view of the victim, the intention of the official is almost invariably irrelevant. As Judge Wright, of the District of Columbia Circuit, wrote in *Hobson v. Hanson*, 269 F. Supp. 401 (D.C. 1967):

> "Orthodox equal protection doctrine can be encapsulated in a single rule: government action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional. The complaint that analytically no violation of equal protection vests unless the inequities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *Hobson v. Hansen, supra*, 269 F. Supp. at 497.

During the past twenty years, when federal courts have been repeatedly involved in cases charging racial discrimination, several common sense lines of inquiry have developed, particularly in the usual situation where the defendant does not admit disparate treatment on the basis of race. Two of these lines of inquiry were used by the Court of Appeals here: first, it agreed with the District Court that plaintiffs' initial obligation is to establish only a prima facie case, which may then be rebutted;[73] and, second, it held that the prima facie case may be made out

73. The propriety of this standard was reaffirmed this past term in *McDonnell-Douglas Corp. v. Green, supra*, and need not be discussed. *See also, Keyes v. School Dist. No. 1, Denver, Colo.*, 93 S. Ct. 2686 (1973).

by indirect proof: numerical disparities, opportunity for discrimination, and apparent similar patterns of conduct elsewhere. The second point deserves some exploration.

1. *Numerical disparities as evidence of racial discrimination*

The Court of Appeals evaluated the diminishing number of blacks on the Panel, and the increasing black population of the City of Philadelphia and its schools, and concluded on the basis of precedents of this Court that "the small proportion of blacks on the Panel points toward the possibility of discrimination."[74]

In cases involving racial discrimination, "statistics often tell much, and Courts listen."[75] Although this rule

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74. Pet. at 47. *See Turner v. Fouche, supra* at 359.

75. *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd*, 371 U.S. 37 (1962). *Accord: United States v. Greenwood Municipal Separate School District*, 406 F.2d 1086, 1092 (5th Cir. 1969). Statistics in this context means nothing more complicated than numbers and percentages; it does not refer to statistical theory as developed by mathematicians. *See* Finkelstein, "The Application of Statistical Decision Theory to the Jury Discrimination Cases," 80 Harv. L.Rev. 338 (1966). Traditional statistical theory applied to these factors, using the binomial theorem, would show that the chances in a random selection of finding one black out of thirteen Panel members are 20 to 1. The chances of finding two blacks are between 7 to 1 and 10 to 1. *See* Freund, *Mathematical Statistics*, 77-9; 156-60; 427 (2d Ed. 1971).

Petitioners have attempted to discredit the use of statistics here, Brief 26 *et seq.*, on the grounds that plaintiffs did not make a showing of statistical significance. This Court has never held that such a showing was required, and the Court of Appeals agreed. *Compare, Commonwealth of Pennsylvania, et al., v. O'Neill, et al.*, 473 F.2d 1029 (3rd Cir. 1973), where because the sole basis for its decision was a disparity which was not shown to be statistically significant, and because the Court of Appeals was confused by apparently contradictory assertions by the District Court in its opinion, a preliminary injunction issued by the District Court was vacated, 473 F.2d at 1031. Moreover, despite introducing testimony by a qualified statistician, the Petitioners have never contended

has primarily been confined to voting rights, employment, school desegregation and jury cases,[76] it has equal application in the instant case.

The Fifth Circuit said in *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, 380 F.2d 385 (5th Cir. 1967), *cert denied, sub nom*, Board of Education of the City of Bessemer v. United States, 389 U.S. 840 (1967):

> "This Court has frequently relied on percentages in jury exclusion cases. Where the percentage of Negroes on the jury and jury venires is disproportionately low compared with the Negro population of a county, a prima facie case is made for deliberate discrimination against Negroes. Percentages have been used in other civil rights cases. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white children in public schools." at 887. (Footnotes omitted.)[77]

The use of numerical imbalances as relevant indi-

Note 75—(*Continued*)
that the figures are not statistically significant in the technical sense.

Petitioners misrepresent *O'Neill*, where the Court of Appeals merely remanded to the District Court to make the judgment required by this Court in *Whitus*—that is, a non-technical examination of the likelihood that a particular result will come about by chance.

76. E.g., *Alabama v. United States*, *supra* (voting); *United States v. Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969), *United States v. Local No. 86*, 443 F.2d 544 (9th Cir. 1971) (employment); *United States v. Greenwood Municipal Separate School District*, *supra* (schools); *Norris v. Alabama*, 294 U.S. 587 (1935) (juries).

77. *See also, United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir. 1959), *cert. denied*, 361 U.S. 838 (1959); *United States ex rel. Seals v. Wiman*, 304 F.2d 53 (5th Cir. 1962), *cert. denied*, 372 U.S. 915 (1963).

cators of racial discrimination was approved by this Court recently in *McDonnell-Douglas Corp. v. Green*, *supra*. In that case, this Court set forth the proper burden of proof in an employment discrimination case, and specifically included numerical comparisons in the list of helpful evidence.[78]

In the light of the precedents, it is important to note that plaintiffs have never asserted, and the Court of Appeals did not hold, that the appointment of one or two blacks to a Panel of thirteen established by itself a prima facie case of racial discrimination. Those figures are only the initial signposts along the way. Plaintiffs in this case are no more entitled to a specific proportion of blacks on the Panel than teachers in a school system or students in a school.[79]

The District Court refused to consider the figures at all, and Petitioners here urge the same approach because of the smallness of the numbers involved. But this approach ignores both the reality of the tokenism of the small numbers—3, 2, 1, 1 out of 52 possibilities on four Panels—and the clear line of constitutional decisions relying on statistics.

The decisions in *Avery v. Georgia*, 345 U.S. 559 (1953), *Jones v. Georgia*, 389 U.S. 24 (1967), and *Sims v. Georgia*, 389 U.S. 404 (1967) indicate that it makes little difference that the size of the specific group from which blacks are allegedly excluded is relatively small, where the exclusion, as here, is repetitive. In those cases, petitioners successfully attacked, on the basis of statistics, the racial composition of jury panels having less than 25 persons. *See also, Turner v. Fouche*, *supra*.

Where class discrimination is charged in the use of the appointment power, the proper approach is for courts to look at the objective results to determine whether constitutional standards have been violated.[80] A statistical

78. *See* 93 St. Ct. at 1825.

79. *See United States v. Montgomery County Bd. of Education*, 395 U.S. 225, 236, (1969); *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 24 (1971).

80. *Palmer v. Thompson*, 403 U.S. 217, 225, (1971); *Avery v.*

pattern from administrative decisions may enable a court to infer, without inquiring into the official motives, that an improper criterion has been used. Thus, the absence of black jurors from all juries in a state or county, despite the presence of qualified blacks within the jurisdiction, has been held to establish a prima facie case of racial discrimination in jury selection.[81]

Although the familiar application of the exclusion rule is in the context of *total* exclusion of Negroes over a period of years,[82] this Court has equally condemned (1) total exclusion from *specific* jury panels, even though other venires had Negro representation;[83] (2) *token* representation of minority group members;[84] (3) *disproportionate* representation of the minority community;[85] and (4) disproportionate *results* from the application of racially neutral standards.[86]

These cases are particularly relevant to plaintiffs' argument. For although one statistical theory does support the mathematical use of the figures here,[87] the raw numbers themselves are the most compelling: out of thirteen members of the Panel, 3 were black in 1965; 2 were black in 1967; 1 was black in 1969; and 1 was black in 1971. No matter how these numbers are twisted, no matter what case law is advanced, the reasonable mind must be compelled to shift the burden to the Mayor and seek an explanation, particularly in view of the black population of the City and the schools. The issue, as this Court said in *Turner v. Fouche*, *supra*, is whether the

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Note 80—*(Continued)*

Georgia, *supra*; *Hill v. Texas*, 316 U.S. 400 (1942); *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966).

81. *E.g.*, *Smith v. Texas*, 311 U.S. 128 (1940).
82. *E.g.*, *Norris v. Alabama*, *supra*.
83. *Avery v. Georgia*, *supra*.
84. *Cassell v. Texas*, 339 U.S. 282 (1950).
85. *Jones v. Georgia*, *supra*; *Sims v. Georgia*, *supra*.
86. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
87. See footnote 75, *supra*.

racial distribution could have occurred by chance, or, as the Court said in *Keyes*, is "adventitious." 41 L. W. at 5007.

Moreover, the District Court and Petitioners appear to have misapplied another consideration: that of qualification. But in cases where racial discrimination is alleged, it is not necessary to determine how many members of the class qualify for the function in question. The legal standard for the existence of a prima facie case does not depend on the number of blacks found to be qualified to serve; it is only relevant that blacks comprise a substantial portion of the population, that *some* blacks are qualified to serve, and that few if any blacks have served in the past.[88]

In *Turner v. Fouche*, *supra*, this Court, applying the statistical rule, compared the percentage of blacks on the grand jury list (37%) to the entire black population of the county (60%). Georgia law in that case required that a grand juror be a registered voter, yet the Court did not look to determine the percentage of blacks who were registered voters, despite the general knowledge that blacks in the South generally do not register as frequently as whites. In that context, the *Turner* holding is particularly compelling, and clearly establishes the principle that the qualifications of the base population are irrelevant for the purposes of prima facie statistical proof of discrimination.

Petitioners nonetheless argue that the acceptance by the Court of Appeals of the numerical comparisons as "pointing toward the possibility of discrimination" violates Rule 52(a) of the Federal Rules of Civil Procedure in that it constitutes a substitution of appellate fact-finding for the fact-finding by the District Court. Apart from the fact that this specific issue was not raised by the Petition for Certiorari, this argument shows more clearly

88. *Hernandez v. Texas*, 347 U.S. 475 (1954). *See also*, *E.E.O.C. v. Plumbers Local No. 189*, 311 F. Supp. 468 (S.D. Ohio, 1970); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *United States v. Ironworkers, Local No. 86*, *supra*.

the misunderstanding of the law under which both Petitioners and the District Court were laboring.

To restate once again: the numerical comparisons in this case are not *determinative;* they are a relevant part of the entire picture, a picture which includes undisputed opportunity for discrimination and undisputed ignorance of eligible qualified blacks on the part of the person responsible for the selection of the Panel. The chief error of the District Court, and one which Petitioners urge this Court to repeat, was to take the individual elements of proof, examine each one in turn, and conclude, with regard to each one in turn, that it was insufficient to prove the case. The Court of Appeals, on the other hand, regarded the numbers only as a relevant part—but a significant part—of the picture. This was in accord with the law established by this Court. *Alexander v. Louisiana, supra; Turner v. Fouche, supra.*

There simply is no statistical "Plimsoll line" in the jurisprudence of this Court which proves discrimination. The issue, again to paraphrase Mr. Justice Frankfurter, is whether such an occurrence, in the context of all the evidence in the case, can be attributed "to mere fortuity."[89]

2. *Opportunity and ignorance of selector as evidence of racial discrimination*

The numerical disparities in this case are arresting, but as plaintiffs have consistently argued, and so the Court of Appeals found, other undisputed evidence was also in the record (and in the Findings of Fact) which support the inference of discrimination.

As the jury cases make clear,[90] ignorance of the

89. *Avery v. Georgia, supra,* at 564 (concurring opinion). *See also, Aeronca Mfg. Co. v. N.L.R.B.,* 385 F.2d 724, 272-8 (9th Cir. 1967).

90. *See Carter v. Jury Commission of Greene County, supra,* at 326.

black community by the jury commission is one of the most frequent reasons that blacks are not considered for jury service. In this case, the District Court found as a fact that "the person assigned by the Mayor of Philadelphia to choose the groups under the enumerated categories . . . was unaware of the existence of many of [the] black organizations [which qualify under the Supplement]."[91] Having made such a finding, however, the District Court proceeded to ignore it totally in its discussion of the case.

The Court of Appeals, on the other hand, recognized the ironic echo of the jury cases, and held that these findings were a relevant and significant part of the picture, since they supported the inference of discrimination, and contributed to the prima facie case.

Petitioners are apparently hard-put to deal with these Findings of Fact, and, despite having relied upon them in the Court of Appeals, argue in this Court that they are incorrect.[92] Not only does the undisputed testimony in the record rebut this argument but Petitioners obviously cannot attack the Findings at this stage of the case.

3. *Similar patterns of conduct*

The District Court found, on the basis of stipulated evidence, that certain patterns of low black participation emerged from an examination of Mayor Tate's appointment and employment patterns. The Court refused to consider that evidence, however, because it held that plaintiffs had not proven that blacks were qualified for the jobs. The Court of Appeals did not discuss the question. But since the Court of Appeals did reach the conclusion that the plaintiffs had made out a prima facie case on the basis of the *entire record*, and since it is this legal judgment that is in question here, this Court should consider the relevance of those Findings of the District Court.

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91. 333 F. Supp. at 1204.

92. Brief for Petitioners, at 41.

The most recent recognition by this Court of the relevance of this kind of evidence was in *Keyes v. School District No. 1, Denver, Colo.*,[93] the Denver school desegregation case. There, one of the questions was whether racial discrimination in one limited geographical part of a school district could be probative of discrimination throughout the district. The common sense conclusion, adopted by the Court, was affirmative.[94]

So in this case, it is obviously probative on the question of whether a prima facie case has been made out that the executive officer whose actions are alleged to be racially discriminatory has maintained a token level of black appointments and has pursued city personnel policies which have "contributed to the increasing economic gap between black and Puerto Rican citizens and a majority of white citizens."[95]

C. *The Court of Appeals Correctly Relied on the Entire Record to See Whether a Case of Racial Discrimination Had Been Shown as a Matter of Law.*

Petitioners' first point for certiorari to this Court attacked the Court of Appeals' reference to certain of plaintiffs' testimony as violative of Rule 52(a) of the Federal Rules of Civil Procedure. This attack is unfounded, and is merely an attempt to make up for an unfavorable record.

First, Petitioners seek to characterize the holding of the Court of Appeals as "manifestly unfair" to Mayor Tate.

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93. 93 S. Ct. 2686 (1973).

94. 93 S. Ct. at 2097. *See also, McDonnell-Douglas v. Green, supra; Aeronca Mfg. Co. v. N.L.R.B., supra; Marquez v. Omaha District Sales Office, Ford Div.*, 440 F.2d 1157 (8th Cir. 1971); *Granitville Co. v. E.E.O.C.*, 438 F.2d 32 (4th Cir. 1971); *Blue Bell Boots v. E.E.O.C.*, 418 F.2d 355 (6th Cir. 1969).

95. "City Employees Study," prepared by the Philadelphia Commission on Human Relations (Sept. 1970, p. 10).

To the contrary, the Court of Appeals was almost apologetic in its conclusion, and Judge Van Dusen, with characteristic graciousness, stated that the Court was "required to act on the basis of the record before it."

Second, Petitioners attack most directly the summary by the Court of Appeals of the testimony of plaintiff W. Wilson Goode regarding certain events of 1969 involving Mayor Tate, appointments to the School Board, and appointment of the 1969 Nominating Panel. The Court of Appeals commented on this testimony,[96] that, if it was true, an inference could be drawn regarding the appointment of the 1971 Panel, the one at issue in this case.[97] Later in its opinion, the Court of Appeals appears to have assumed that the testimony was true,[98] despite the absence of a Finding of Fact by the District Court on the question. Petitioners most strongly urge that this was reversible error. There are several reasons why consideration of this testimony by the Court of Appeals was proper.

To begin with the facts, the District Court had stated in its opinion that "the only direct proof offered by the plaintiffs was a newspaper article allegedly quoting Mayor Tate to the effect that he would not appoint any more blacks to the Board of Education."[99] Since Mr. Goode had, without question, testified to the same effect,[100] this statement was absolutely incorrect, and the Court of Appeals was undoubtedly aware of that fact. Moreover, the Court of Appeals was also able to determine that no objection had been interposed to Mr. Goode's testimony.[101] Finally, the Court of Appeals was able to

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96. J31a-50a.

97. 472 F.2d at 616, n.9.

98. 472 F.2d at 618, n.16a.

99. 333 F. Supp. at 1206.

100. J40a-41a.

101. Petitioners appear to assume, even though there is no basis for the assumption in the record, that Mr. Goode's testimony was based on the newspaper article. Brief for Petitioners, p. 37.

place Mr. Goode's testimony and Mr. Zecca's testimony side-by-side and conclude that Mr. Goode's testimony was, in fact, uncontradicted. For Mr. Zecca, when asked about 1969, repeatedly stated that he did not recall the events:

> Q. Mr. Zecca, do you recall the controversy over the appointment of a successor to Mr. Goldman on the School Board?
>
> A. No, I don't.[102]

And later, after showing Mr. Zecca the copy of the newspaper article, the authenticity of which was never questioned:

> Q. You don't recall, however, this having happened?
> A. No.[103]

The issue before this Court is, given the above facts, and the fact that Petitioners did not present any testimony which tended to cast any doubt on Mr. Goode's version of the incident, was the Court of Appeals correct in regarding Mr. Goode's testimony as part of the overall picture?

First, the District Court's conclusion of fact was clearly erroneous, *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), in that the Court of Appeals must have had "the definite and firm conviction that a mistake had been committed," in stating, in effect, that Mr. Goode had not testified at all concerning the events of 1969. Moreover, since the error consisted in ignoring

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Note 101—(*Continued*)

Mr. Goode would have testified, had he been cross-examined, or had an objection been raised, that his testimony was based on his hearing and seeing the Mayor make the statements in question on a television program. It is somewhat peculiar that, in a Brief full of assertions of facts that are *dehors* the record, Petitioners nowhere deny the truth of Mr. Goode's account of the 1969 events.

102. J66a.

103. J93a.

certain testimony, the Court of Appeals was justified in examining it, as it might not have been had the District Court held that it did not believe Mr. Goode.

Second, the District Court made no finding at all on the question of whether the Mayor did, in fact, make the statement, and, as noted, Petitioners have not to this day addressed themselves to it. Thus, the Court of Appeals did not set aside any Findings of Fact within the meaning of Rule 52(a), but merely supplemented the Findings from obvious uncontradicted evidence in the record.

Third, in a case raising constitutional questions, appellate courts have greater leeway to review the entire record, including matters not specifically passed on by the District Court, to determine whether the Constitution has been violated. See *Jacobellus v. Ohio*, 378 U.S. 184, 189 (1964); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). *See also, Guzick v. Drebus*, 431 F.2d 594, 599 (6th Cir. 1970), *cert denied*, 401 U.S. 948 (1971); *Cousins v. City Council of City of Chicago*, 466 F.2d 830 (7th Cir. 1972), *cert. denied*, 409 U.S. 893 (1972).

Fourth, the Court of Appeals used Mr. Goode's testimony only as a basis for drawing a consistent inference of discrimination; that testimony did not constitute a major basis for the Court's decision, but was merely regarded as one of the numerous elements in the record which were consistent with a prima facie case of racial discrimination. Petitioners had ample opportunity to rebut both the specifics and the import of the evidence, and failed to do so.

III. The Court of Appeals dealt correctly with the scope of relief to be afforded on remand.

The Court of Appeals' principal direction for the District Court on remand was that it was the lower court's "function to determine the precise nature of the relief to which plaintiffs are entitled."[104] The Court of Appeals

104. 472 F.2d at 618.

went on, however, to articulate some of the principal items which the lower court should consider on remand. It is in that discussion that Petitioners assign error, because the appeals court stated that the lower court should enjoin the present Mayor from discriminating in regard to the 1973 or future Panels. Petitioners argue that since no fault has been assigned to Mayor Rizzo, it was error for the Court of Appeals to order relief against him.

This contention can be answered briefly. First, the record before the Court of Appeals, as the Court took pains to point out in footnote 21, Pet. 49, 472 F.2d at 619, showed that Mr. Zecca was Deputy Mayor, and was ignorant of black organizations. Moreover, he regarded reappointment of the organizations previously serving on the Panel as routine. Unless the defendants can show that these facts are no longer true, then prospective relief will obviously be required to prevent future violations of the Fourteenth Amendment, for "equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid."[105]

Petitioners have asserted that the facts assumed by the Court of Appeals are not true.[106] If that is so, and if the process of appointing the Panel is now free from the taints found by the Court of Appeals, then prospective relief will not be necessary. This is a question, as the Court of Appeals stated, to be resolved by the District Court on remand. Plaintiffs recognize that if the facts are sufficiently changed, they might not be entitled to every detail of the relief described by the Court of Appeals.

On the other hand, the class of black citizens of Philadelphia, according to the Court of Appeals, have established that their rights under the Fourteenth Amendment have been violated by the chief executive officer of the city acting in his official capacity. Regardless of the fact that Mayor Tate has been succeeded by Mayor Rizzo,

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105. *United States v. Paramount Pictures*, 334 U.S. 131 (1948).

106. Brief for Petitioners, p. 50.

plaintiffs are entitled to judicial assurance that such violations will not continue. To argue this does not reflect on Mayor Rizzo,[107] but is only the traditional measure of protection offered to prevailing plaintiffs by the federal courts. The District Court has

> "not merely the power but the duty to render a decree which [will] . . . so far as possible eliminate the discriminatory effects of the past, as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

The opinion of the Court of Appeals obviously contemplated an evidentiary hearing on remand. Prior to that time, appropriate defendants may be substituted and discovery engaged in. Thereupon, plaintiffs will be able to determine the precise nature of the relief they will seek from the District Court. Plaintiffs may conclude that under the circumstances only declaratory relief is needed; they may seek only removal of the school board members appointed as a result of the deliberations of the 1971 Panel;[108] they might seek relief regarding the 1973 Panel which has been appointed, and has made its nominations; or they might seek prospective relief against a system of appointing the Panel which has been held by the Court of Appeals to have violated their Fourteenth Amendment rights, if that same system appears to be operative under the administration of the present Mayor.

Plaintiffs recognize, however, that, as stated by the Court of Appeals, the precise nature of the relief they will receive will be decided by the District Court, in accor-

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107. *But see* footnote 22, *supra*.

108. This would have no effect on previous actions taken by the members of the Board, even if they had been illegally appointed. *Commonwealth ex rel. Palerno v. Pittsburgh*, 339 Pa. 173, 13 A.2d 24 (1940); *Huber v. Pennsylvania Human Relations Commission*, 43 D. & C. 2d 437 (C. P. Dauphin Cty., 1967); *United States ex rel. Watkins v. Commonwealth of Pennsylvania*, 214 F. Supp. 913 (W.D. Pa. 1963).

dance with general principles, such as those set forth by this Court in *Swann, supra*, at 28.

In view of the above, it is clear that the Court of Appeals did not err when it suggested that prospective relief would be appropriate on remand. In any event, if at some time in the future, there is an Order about which Petitioners take umbrage, the time to object to it will occur. At this time, there is no Order for this Court to review, and thus no action is needed.

CONCLUSION

For the reasons above stated respondents respectfully urge this Court to affirm the judgment of the Court of Appeals, thereby remanding the case to the District Court for the Eastern District of Pennsylvania for evidentiary hearings and the entry of appropriate relief.

Respectfully submitted,

By

EDWIN D. WOLF
LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Attorney for Respondents

IN THE

Supreme Court of the United States

DEC 4 1973
MICHAEL RODAK, JR., CLERK

October Term, 1972

No. 72-1264

MAYOR OF THE CITY OF PHILADELPHIA, et al.,
Petitioners

v.

EDUCATIONAL EQUALITY LEAGUE, et al.,
Respondents

REPLY BRIEF FOR PETITIONERS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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ARGUMENT

Petitioners submit this reply brief to this Honorable Court for the purpose of responding to several misstatements and assertions made by respondents in their brief.

On page 7 of their brief, respondents make the following statement:

> c. Civil Service appointments to positions with salaries of $15,000 a year, carried out under the supervision of the City Personnel Director, (responsible to the Mayor under the City Home Rule Charter) were 742 whites and 49 blacks (6%).[22]

Contrary to respondent's assertion, the Personnel Director is indisputably *not* subject to the Mayor under the Home Rule Charter. Section 3-205 of the Charter provides that, "The Civil Service Commission shall appoint the Personnel Director." The Annotation to Section 3-205, authorized by the Charter Drafting Committee contemporaneously with the Charter itself, provides:

> The Civil Service Commission, rather than the Mayor, has been designated as the appointing power of the Personnel Director as a step towards assuring the complete *independence of the Personnel Director* and the separation of the administration of the civil service system from partisan political considerations and influences, direct or indirect. This is an indispensible requirement of any true merit system of City employment. [Emphasis ours].

Respondents' misstatement of the Charter is compounded by the misrepresentation in footnote 22 which enumerates twenty cases supposedly probative of racial discrimination in the appointment of the Educational

Nominating Panel. In six of the twenty cases cited, neither the City nor any officer or agency thereof was a party.[1]

Racial Discrimination was not a factor in nine of the remaining fourteen cases.[2] Of the remaining five cases, only one, *Commonwealth of Pennsylvania v. O'Neill*, 348 F. Supp. 1084 (E.D. Pa. 1972), had anything to do with racial discrimination in employment; and, in that case, at 348 F. Supp. 1104, the District Judge specifically refused to find intentional racial discrimination.

As if it were not enough for respondents to use this litany of irrelevant cases to prove racial discrimination in the case at bar, respondents also refer to them at page 39 of their brief (Footnote 107), in an attempt to impart racial discrimination to the present Mayor, Frank L. Rizzo. The record in this case is *totally devoid of any evidence of any discriminatory practice on the part of Mayor Rizzo*. It is most distressing that the Lawyers' Committee for Civil Rights Under Law, self-styled protector of constitutional rights and attorney for plaintiffs herein, would even insinuate that the naming of Mayor Rizzo as a defendant in

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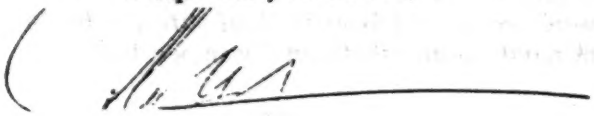
1. *Nicholson v. Pittenger*, C.A. No. 72-1596; *Shannon v. HUD*, 436 F.2d 809 (3rd Cir. 1970) [Mr. Wolf, as attorney for plaintiffs in *Shannon* should be aware that there were no municipal defendants in that case]; *Germantown Community Council v. HUD*, C.A. No. 69-2426; *Washington Square West Project Area Committee v. HUD*, C.A. No. 69-2972; *Residents Advisory Board v. Philadelphia Housing Authority*, C.A. No. 72-2399; *Brown v. Philadelphia Housing Authority*, C.A. No. 72-2083.

2. *Black v. Rizzo*, 360 F. Supp. 648 (E.D. Pa. 1972); *Jackson v. Hendrick*, (C.P. Phila.) Feb. Term, 1971, No. 2437; *Resistance v. Commissioners of Fairmount Park*, C.A. No. 69-819; *Leslie Tobin Imports v. Rizzo*, 305 F. Supp. 1135 (E.D. Pa. 1969); *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D. Pa. 1968); *Peace Inc. v. Philadelphia*, C.A. No. 70-2101; *Friends Peace Committee v. O'Neill*, C.A. No. 72-992; *Free Press, Inc. v. Rizzo*, C.A. No. 70-3175; *Farber v. Rizzo*, C.A. No. 72-2052.

other suits should have any bearing whatsoever on the decision in the instant case.

Respectfully submitted,



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Assistant City Solicitor
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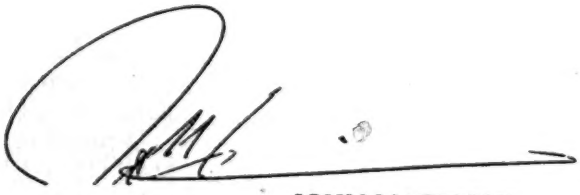
Deputy City Solicitor
MARTIN WEINBERG
City Solicitor

CERTIFICATE OF SERVICE

I, John Mattioni, Deputy City Solicitor, do hereby certify that three copies of the Reply Brief for Petitioners were served on Edwin D. Wolf, attorney for Respondents, by hand, on the 5th day of December, 1973.



JOHN MATTIONI
Deputy City Solicitor

MAYOR OF PHILADELPHIA *v.* EDUCATIONAL EQUALITY LEAGUE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72–1264. Argued December 10, 1973—Decided March 25, 1974

The Mayor of Philadelphia is empowered by the city charter to appoint a Nominating Panel, which in turn submits to him nominees to fill vacancies on the School Board. The Panel consists of 13 members. The Mayor must appoint four members from the citizenry at large; each of the remaining nine must be the highest ranking officer of one of nine designated categories of citywide organizations. A new Panel is convened in every odd-numbered year. Respondents brought this action for declaratory and injunctive relief charging that Mayor Tate had violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against Negroes in appointments to the 1971 Panel. Following hearings, the District Court found that respondents had failed to prove racial discrimination and dismissed their complaint. The Court of Appeals reversed, concluding that respondents had established an unrebutted prima facie case of unlawful exclusion of Negroes from consideration for service on the 1971 Panel. Although Tate was succeeded, while the case was *sub judice*, by Mayor Rizzo (as to whose Panel appointment practices the record is silent), the court directed the issuance of certain injunctive relief against Rizzo with regard to the 1973 Panel and future Panels. *Held:*

1. The Mayor's principal argument, that federal courts may not interfere with the discretionary appointment powers of an elected executive officer, is of greater importance than was accorded it by the Court of Appeals, but the argument need not be addressed here since the record is devoid of reliable proof of racial discrimination. Pp. 613–616.

2. The Court of Appeals' finding of racial discrimination rests on ambiguous testimony as to a statement in 1969 by then Mayor Tate with regard to the 1969 School Board, not the 1971 Panel; the unawareness of certain organizations on the part of a city official who did not have final authority over the challenged appointments; and racial-composition percentage comparisons the

District Court correctly rejected as meaningless in the context of this case. The Court of Appeals therefore erred in overturning the District Court's findings and conclusions. Pp. 616–621.

3. The Court of Appeals erred in ordering injunctive relief against Mayor Rizzo with regard to the 1973 Panel and future Panels since the record speaks solely to the appointment practices of Tate, his predecessor, who left office in 1972. Pp. 621–623.

4. The principal issue throughout this litigation has been whether Mayor Tate violated the Fourteenth Amendment. There is no basis for remanding the case to the District Court for resolution of peripheral state law issues under that court's pendent jurisdiction or, alternatively, for abstention so that the case may be tried anew in a state court. Pp. 623–629.

472 F. 2d 612, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, and in Part II of which DOUGLAS, J., joined, *post*, p. 633.

John Mattioni argued the cause and filed briefs for petitioner.

Edwin D. Wolf argued the cause and filed a brief for respondents.

MR. JUSTICE POWELL delivered the opinion of the Court.

In 1965 the voters of Philadelphia approved a public education supplement to their city charter establishing the present structure of the Philadelphia Board of Education (the School Board or Board). The supplement, which appears as Art. XII of the city charter,[1] vests in the Mayor a double appointment power with regard to the School Board. The Mayor appoints the nine

[1] The relevant provisions of Art. XII of the Philadelphia Home Rule Charter are set forth as an appendix, *infra*, p. 629 *et seq.*

members of the Board, but he is assisted in that task by another entity that he also appoints, the Educational Nominating Panel (the Nominating Panel or Panel). The function of the Panel is to seek out qualified candidates for service on the School Board by polling civic organizations and the citizenry at large, to interview those candidates, to deliberate on their qualifications, and to submit selected nominees to the Mayor. The Panel submits three nominees for every vacancy on the Board. In his discretion, the Mayor may request an additional three nominees per vacancy. The Mayor must then make appointments to the School Board from among the nominees submitted by the Panel.

The Nominating Panel consists of 13 members. Under the terms of the city charter, the Mayor appoints four members of the Panel from the citizenry at large. Each of the remaining members must be the highest ranking officer of one of nine categories of citywide organizations or institutions, such as a labor union council, a commerce organization, a public school parent-teachers association, a degree-granting institution of higher learning, and the like.[2] Although the city charter describes with

[2] Section 12–206 (b) of Art. XII of the Philadelphia Home Rule Charter provides:

"Nine members of the Educational Nominating Panel shall be the highest ranking officers of City-wide organizations or institutions which are, respectively:

"(1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,

"(2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,

"(3) a public school parent-teachers association,

"(4) a community organization of citizens established for the purpose of improvement of public education,

substantial specificity the nine categories of organizations or institutions whose leaders may serve on the Nominating Panel, the charter does not designate any particular organization or institution by name. Accordingly, it is possible for more than one such citywide entity to qualify under any given category.

The members of the Nominating Panel serve two-year terms. A new Panel is appointed and convened in every odd-numbered year, when, in the ordinary course, three vacancies occur on the School Board.[3] Thus, since 1965 there have been five Panels. Mayor James J. H. Tate, whose term expired in 1972, appointed the 1965, 1967, 1969, and 1971 Panels. The present Mayor, Frank Rizzo, appointed the 1973 Panel.

Respondents include the Educational Equality League,[4] the president of the League, another citizen of Philadelphia, and two students attending the city's public schools. Shortly after Mayor Tate's appointment

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"(5) a federation, council, or other organization of non-partisan neighborhood or community associations,

"(6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,

"(7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,

"(8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and

"(9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City."

[3] The Mayor must also convene the Nominating Panel whenever a vacancy occurs on the School Board due to resignation, removal, or other unexpected event.

[4] The Educational Equality League is a nonprofit corporation devoted to safeguarding the educational rights of all Philadelphia citizens regardless of race. It was founded in 1932 and presently has approximately nine hundred members.

of the 1971 Nominating Panel, respondents filed this suit as a class action in the United States District Court for the Eastern District of Pennsylvania, relying on 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3). The gravamen of their complaint, which named the Mayor of Philadelphia and the Nominating Panel as defendants, was that Mayor Tate had violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against Negroes in his appointments to the 1971 Panel. Respondents sought an injunction barring the 1971 Panel from submitting nominees for the Board to the Mayor and a declaratory judgment that Mayor Tate had violated the Constitution. They also requested an order directing the Mayor to appoint a Nominating Panel "fairly representative of the racial composition of the school community."

Respondents did not challenge the racial composition of the School Board, which consisted of two Negroes and seven whites when respondents filed their complaint and which now consists of three Negroes and six whites.[5] They did not allege that the 1971 Panel discriminated in its submission of School Board nominees to the Mayor.[6] Such an attack would have been difficult to

[5] *Educational Equality League* v. *Tate*, 333 F. Supp. 1202, 1204 (ED Pa. 1971); Tr. of Oral Arg. 14. In their complaint respondents alleged that Mayor Tate had denied Negroes "proper representation" on the School Board. But respondents have not pursued this contention at any stage of this suit.

[6] Counsel for respondents commented at oral argument that respondents "are not in any way attacking the actions of the panel." Tr. of Oral Arg. 44. See *id.*, at 24. This apparently means only that respondents do not contend that the 1971 Panel in fact excluded Negroes from consideration in recommending School Board nominees to the Mayor. It does not mean that respondents do not seek to undo what the Panel has done. Indeed, respondents have sought relief that would invalidate the nominations made by the Panel, on the theory that the Panel was selected in violation of the Constitu-

mount in any event. Of the nine nominees submitted to the Mayor by the 1971 Panel, four were Negroes and five were whites.[7] Moreover, respondents did not dispute the validity of the qualifications set forth in the city charter with regard to the Nominating Panel. Finally, despite the prayer in their complaint for an order directing the appointment of a Panel "fairly representative of the racial composition of the school community . . . ," respondents disclaimed any effort to impose a racial quota on the Mayor in his appointments to the Panel.[8] Respondents sought solely to establish that the Mayor unconstitutionally excluded qualified Negroes from consideration for membership on the Nominating Panel and to remedy that alleged defect prospectively as well as retrospectively.[9]

Following two days of hearings, the District Court dismissed respondents' complaint. *Educational Equality League* v. *Tate*, 333 F. Supp. 1202 (ED Pa. 1971). In its findings of fact, the court noted that approximately 34% of the population of Philadelphia and approximately 60% of the students attending the city's various schools were Negroes. *Id.*, at 1202–1204. The court found the following racial composition of the Nominating

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tion and that its actions, although not discriminatory, are voidable. See nn. 9, 12, *infra*.

[7] *Educational Equality League* v. *Tate*, *supra*, at 1204.

[8] Tr. of Oral Arg. 25. See *Educational Equality League* v. *Tate*, 472 F. 2d 612, 616 (CA3 1973).

[9] Although respondents' suit is addressed to the Nominating Panel, the relief they seek would have an impact on the School Board as well. In order to cure any taint deriving from the allegedly unlawful selection of the 1971 Panel, respondents take the view that the federal courts should remove from the Board all persons nominated by that Panel. Tr. of Oral Arg. 37, 43–44. Given the racial mix of the present Board, this would require the removal of Negroes as well as whites. *Id.*, at 44.

Panels from 1965 to 1971: the 1965 Panel had 10 whites and three Negroes; the 1967 Panel had 11 whites and two Negroes; the 1969 Panel had 12 whites and one Negro; and the 1971 Panel had 11 whites and two Negroes.[10] *Id.*, at 1204. The court further found that "several organizations reflecting the views and participation of the black community" could qualify as organizations whose highest ranking officers might serve on the Nominating Panel. *Ibid.* The court also found that Deputy Mayor Zecca, the person assigned by Mayor Tate to assist in selecting qualifying organizations and institutions, at the time of the hearing was unaware of the existence of many of these "black organizations." *Ibid.*

On the basis of its finding of fact, the District Court concluded that respondents had failed to prove that the 1971 Panel was appointed in violation of the Fourteenth Amendment. It held that differences between the percentage of Negroes in the city's population (34%) or in the student body of the public school system (60%) and the percentage of Negroes on the 1971 Nominating Panel (15%) had no significance. *Id.*, at 1205–1207. In large part this was because the number of positions on the Panel was too small to provide a reliable sample; the addition or subtraction of a single Negro meant an 8% change in racial composition. *Id.*, at 1206. The court also rejected as unreliable data submitted by respondents in an effort to show that Mayor Tate's appointments to various positions in city government other than the Panel reflected a disproportionately low

[10] Mayor Tate's appointments to the 1971 Panel initially consisted of 12 whites and one Negro. However, after Mayor Tate selected the president of a particular citywide organization but before the 1971 Panel convened, the leadership of the organization changed hands, and its white president was replaced by a Negro. The Mayor then reaffirmed his selection of that organization, which produced the 11-to-2 racial mix of the 1971 Panel.

percentage of Negroes and a pattern of discrimination. *Ibid.* Moreover, the court dismissed as inadmissible hearsay a 1969 newspaper account of an alleged statement by Mayor Tate that at that time he would appoint no more Negroes to the School Board. *Ibid.*

The Court of Appeals for the Third Circuit reversed. *Educational Equality League* v. *Tate*, 472 F. 2d 612 (1973).[11] Relying on statistical data about the Panel rejected by the District Court and going outside that court's findings of fact in other respects, the Court of Appeals concluded that respondents had established an unrebutted prima facie case of unlawful exclusion of Negroes from consideration for service on the 1971 Panel. *Id.*, at 618. Moreover, although the Mayor's office had changed hands while the case was *sub judice* and although there was nothing in the record addressed to the appointment practices of the new Mayor with regard to the Nominating Panel, the Court of Appeals directed the issuance of extensive injunctive relief against the new Mayor. *Id.*, at 619. In particular, the Court of Appeals ordered the District Court to undertake an ongoing supervision of the new Mayor's appointments to the 1973 and future Panels. *Ibid.*[12]

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[11] The Court of Appeals held that the Nominating Panel is not a "person" within the meaning of 42 U. S. C. § 1983, and it therefore affirmed the District Court's dismissal of the complaint as to the Panel. 472 F. 2d, at 614, nn. 1 and 4. Respondents do not seek review of this holding, and we do not address it.

[12] The Court of Appeals remanded to the District Court the question of whether those persons appointed to the School Board from among the nominees submitted by the 1971 Panel should be removed from office. *Id.*, at 618 n. 20. In an unsuccessful petition for rehearing filed with the Court of Appeals, respondents requested the court to modify its opinion "and specifically direct the District Court to use appropriate equitable remedies to assure that all members of the School Board who were appointed through the unconstitutional processes described in this case, be promptly

We granted the Mayor's petition for certiorari. 411 U. S. 964 (1973). We conclude that the Court of Appeals erred in overturning the District Court's findings and conclusions. We also hold that it erred in ordering prospective injunctive relief against the new Mayor in a case devoted exclusively to the personal appointment policies of his predecessor.

I

The Mayor's principal contention is that judicial review of the discretionary appointments of an executive officer contravenes basic separation-of-powers principles. The Mayor cites cases concerning discretionary appointments in the Federal Executive Branch, such as *Marbury* v. *Madison*, 1 Cranch 137 (1803), and *Myers* v. *United States*, 272 U. S. 52 (1926). He notes that Pennsylvania, like the Federal Government, has a tripartite governmental structure, and he argues that the principles shaping the appropriate scope of judicial review are the same at the state level as at the federal level.

Neither the District Court nor the Court of Appeals addressed this argument at length. The District Court expressed its "reservations" about exerting control over "an elected chief executive in the exercise of his discretionary appointive power. . . ," 333 F. Supp., at 1206, but that court based its dismissal of respondents' complaint on the absence of proof of discrimination. The Court of Appeals brushed aside the "reservations" of the District Court, concluding that the Nominating Panel was not intended to operate as part of the Mayor's staff and thus that the appointments were not discre-

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replaced by persons appointed as a result of a nominating process which conforms to the requirements of the Fourteenth Amendment, these equitable remedies to take into account the necessity of having an operating school board at all times."

tionary. 472 F. 2d, at 617. And, although nine of the seats on the Panel are subject to restrictive qualifications embodied in the city charter, which are not challenged by respondents, the Court of Appeals proceeded as though this were a case where access to participation in a governmental or other entity or function is open to all citizens equally. Drawing by analogy from cases dealing with such incidents of citizenship as jury service and the right to nondiscrimination in employment, *e. g.*, *Turner* v. *Fouche*, 396 U. S. 346 (1970), and *Smith* v. *Yeager*, 465 F. 2d 272 (CA3), cert. denied, *sub nom. New Jersey* v. *Smith*, 409 U. S. 1076 (1972), the court declared that "a prima facie case is established by a demonstration that blacks were under-represented [on the Panel] and that there was an opportunity for racial discrimination." 472 F. 2d, at 618.

We disagree with the Court of Appeals' conclusion that the appointments at issue are not discretionary. The court's view that the Panel is not a part of the staff of the mayor is not self-evident, as we understand the functions of the Panel. But in any event this is irrelevant to whether the Mayor's power to appoint the Panel is discretionary. Executive officers are often vested with discretionary appointment powers over officials who by no stretch of the imagination are members of the staff of the appointing officer. The appointment of judges is a familiar example. Likewise, the appointments to the Panel are discretionary by any reasonable measure. With regard to the four seats on the Panel devoted to the citizenry at large, the city charter holds the Mayor accountable only at the polls. And, although the charter narrows the Mayor's range of choice in filling the other nine seats, it remains true that the final selection of the membership of the Panel rests with the Mayor, subject always to the oversight of the voters.

It is also our view that the Court of Appeals did not assign appropriate weight to the constitutional considerations raised by the Mayor. To be sure, the Mayor's reliance on federal separation-of-powers precedents is in part misplaced, because this case, unlike those authorities, has nothing to do with the tripartite arrangement of the Federal Constitution.[13] But, to the degree that the principles cited by the Mayor reflect concern that judicial oversight of discretionary appointments may interfere with the ability of an elected official to respond to the mandate of his constituency, they are in point. There are also delicate issues of federal-state relationships underlying this case. The federalism questions are made particularly complex by the interplay of the Equal Protection Clause of the Fourteenth Amendment, with its special regard for the status of the rights of minority groups and for the role of the Federal Government in protecting those rights. The difficulty of the issues at stake has been alluded to by the Court, without elaboration, as recently as in *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320 (1970). *Carter* concerned a state governor's alleged discriminatory exclusion of Negroes in his discretionary appointments to a county jury commission. The Court found on the record an absence of proof of discrimination, but it nevertheless recognized "the problems that would be involved in a federal court's ordering the Governor of a State to exercise his discretion in a particular way . . . ." *Id.*, at 338.[14]

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[13] This is not to say, of course, that the State of Pennsylvania may not pattern its government after the scheme set forth in the Federal Constitution or in any other way it sees fit. The Constitution does not impose on the States any particular plan for the distribution of governmental powers. See *Sweezy* v. *New Hampshire*, 354 U. S. 234, 256 (1957) (Frankfurter, J., concurring).

[14] In a concurring opinion in *Carter*, Mr. Justice Black revealed

Were we to conclude that respondents had established racial discrimination in the selection process for the Panel, we would be compelled to address the "problems" noted in *Carter, supra*, and raised by the Mayor. We need not go so far, however, because we find that this case founders on an absence of proof, even under the approach taken by the Court of Appeals.

II

The Court of Appeals bottomed its conclusion that the Fourteenth Amendment had been violated on three indicia, only one of which was based on a finding by the District Court. Whether taken singly or in combination, these factors provide no adequate basis for the court's conclusion that respondents had established a prima facie case of racial discrimination.

First, the Court of Appeals relied on an alleged statement by Mayor Tate in 1969 that in filling the vacancies then open on the *School Board* he would appoint no Negroes in addition to the two already on it. 472 F. 2d, at 615–616. Respondents presented two items as evidence of this statement. During cross-examination of Deputy Mayor Zecca, counsel for respondents directed Mr. Zecca's attention to a 1969 newspaper article dealing with the alleged statement. Deputy Mayor Zecca denied the accuracy of the newspaper account; [15] the

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that for him these "problems," as the Court put it, were conclusive. "In my judgment the Constitution no more grants this Court the power to compel a governor to appoint or reject a certain individual or a member of any particular group than it grants this Court the power to compel the voters of a State to elect or defeat a particular person or a member of a particular group." 396 U. S., at 341. Mr. Justice Black's views have not, however, been adopted by the Court.

[15] The interchange between counsel for respondents and Mr. Zecca concerning the 1969 statement, App. 91a–93a, was as follows:

"BY MR WOLF:

"Q. Mr. Zecca, we were discussing earlier a statement by Mayor

District Court ruled that the newspaper account was inadmissible hearsay.[16] The Court of Appeals made no mention of this newspaper account. Rather, although noting that the District Court had made no finding on the subject, the court focused on the testimony of one of respondents' witnesses that Mayor Tate had made the 1969 statement.[17] The court apparently assumed the

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Tate in 1969 that he would not appoint any additional Negroes to the School Board and you said you didn't recall that statement.

"A. I said I don't think that he made such a statement.

"Q. Well, all right.

"May I show you a very bad copy of a page of the Philadelphia Inquirer, Saturday, May 3, 1969, and the article says he indicated, referring to the Mayor, he would not appoint another Negro to the Board because the Negro community has good representation in the two Negroes now serving on the Board.

"Do you recall that article?

. . . . .

"THE WITNESS: I don't recall the article specifically but it doesn't say he is not going to name another member.

"It said that he indicated that he wouldn't name another member; and this is, of course, the reporter's version of this, but the quote said the Negro community has good representation in the two Negroes now serving on the Board.

"They may have asked him whether he was going to appoint any more Negroes to the Board and he said the Negro community has good representation on the Board as it is; just like it has excellent representation right in this story.

"BY MR. WOLF:

"Q. You don't recall, however, this having happened?

"A. No."

[16] 333 F. Supp., at 1206.

[17] Under direct examination by respondents' counsel, the witness testified that:

"At that time [in 1969] the Mayor made a public statement that he was not going to appoint any more Negroes to the Board because, in his feeling, they had adequate representation and that he was going to appoint someone from the nominees to the Board of Education." App. 41a.

truth of the statement, for it declared that the testimony was made "without contradiction or objection . . . ." [18]

In our view, the Court of Appeals' reliance on the alleged 1969 statement was misplaced. Assuming the admissibility and reliability of such double hearsay,[19] we are unable to conclude that an ambiguous statement purportedly made in 1969 with regard to the racial composition of the then School Board proves anything with regard to the Mayor's motives two years later in appointing the 1971 Nominating Panel. The Court of Appeals noted that if the Mayor had in 1969 decided to exclude Negro nominees from appointment to the Board, "an inference may be drawn that the Mayor in similar manner excluded blacks from consideration as members

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[18] 472 F. 2d, at 616. The testimony was in fact contradicted by Deputy Mayor Zecca while under cross-examination by respondents' counsel. See n. 15, *supra*.

[19] There is some question in the record whether respondents' witness' knowledge of the 1969 statement derived from the 1969 newspaper account that the District Court ruled inadmissible hearsay or from an independent source. At oral argument, counsel for respondents informed the Court that the witness giving the testimony had heard the statement on television, although counsel conceded that this had not been made clear in the record. Tr. of Oral Arg. 31. Whether the testimony reflected the newspaper account or a television report, it was nonetheless hearsay. The Court of Appeals made no effort to determine whether the testimony met any recognized exception to the general rule that hearsay is inadmissible.

The dissenting opinion, based in part on this single ambiguous piece of testimony, argues that this "highly probative evidence" was not hearsay. *Post*, at 644. It may have been admissible for what it was worth as an exception to the hearsay rule, but *hearsay* it certainly was—and its probative value was so dubious that the District Court ignored it. Mayor Tate was not called as a witness by either side and accordingly did not testify. Thus, it is hardly surprising that "nowhere in this record can one find a denial by Mayor Tate that he did not say what the testimony indicated." *Post*, at 645.

of the 1971 Panel." 472 F. 2d, at 616 n. 9. That inference is supposition. It cannot be viewed as probative of a future intent to discriminate on the basis of race with regard to a different governmental entity. Furthermore, it is refuted by the fact that the Mayor later appointed Negroes to the 1971 Panel and, for that matter, to the School Board itself.

Second, the Court of Appeals cited the District Court's finding that Deputy Mayor Zecca had been unaware of many "black-oriented organizations" that could qualify under the categories of organizations and institutions set out in the city charter. 472 F. 2d, at 616. The court thought that, given Mr. Zecca's important position in the appointment process in 1971, his ignorance would "support an inference that the selection process had a discriminatory effect." *Id.*, at n. 13. This is another speculative inference. Deputy Mayor Zecca did not make the appointments to the Panels. That task belonged to Mayor Tate. It is unlikely that an elected mayor would be ignorant of any viable citywide organization or institution, particularly if he had held office for a number of years. Thus Deputy Mayor Zecca's unfamiliarity with certain organizations may not be imputed automatically to the official holding the appointment power. Moreover, there has been no showing in this record that Mr. Zecca's unawareness of organizations or institutions was restricted to what the Court of Appeals referred to as "black-oriented organizations." *Id.*, at 616. The Deputy Mayor may well have been equally uninformed of the existence of many other Philadelphia organizations and groups.

As a third indicator of the exclusion of Negroes, the Court of Appeals again went outside the District Court's findings. As noted earlier, the District Court rejected as unreliable, percentage comparisons of the racial com-

position of the Panel and of the population of Philadelphia. 333 F. Supp., at 1206, 1207. The Court of Appeals thought it unfortunate that "the parties did not introduce the expert testimony of a statistician on whether the frequency of black appointments to the 13-member Panel fell outside the range to be expected were race not a factor. . . ," 472 F. 2d, at 618, but nevertheless found the small proportion of Negroes on the Panel "significant." *Ibid.* This led the court to conclude that "the small proportion of blacks on the Panel points toward the possibility of discrimination." *Ibid.*

Statistical analyses have served and will continue to serve an important role as one indirect indicator of racial discrimination in access to service on governmental bodies, particularly where, as in the case of jury service, the duty to serve falls equally on all citizens. *E. g., Carter* v. *Jury Comm'n of Greene County,* 396 U. S. 320 (1970); *Hernandez* v. *Texas,* 347 U. S. 475 (1954); *Avery* v. *Georgia,* 345 U. S. 559 (1953). See *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 805 (1973) (employment discrimination). But the simplistic percentage comparisons undertaken by the Court of Appeals lack real meaning in the context of this case. Respondents do not challenge the qualifications for service on the Panel set out in the charter, whereby nine of the 13 seats are restricted to the highest ranking officers of designated categories of citywide organizations and institutions. Accordingly, this is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded. At least with regard to nine seats on the Panel and assuming, *arguendo,* that percentage comparisons are meaningful in a case involving discretionary appointments, the relevant universe for comparison purposes consists of the highest ranking officers of the categories of

organizations and institutions specified in the city charter, not the population at large. The Court of Appeals overlooked this distinction. Furthermore, the District Court's concern for the smallness of the sample presented by the 13-member Panel was also well founded. The Court of Appeals erred in failing to recognize the importance of this flaw in straight percentage comparisons.

In sum, the Court of Appeals' finding of racial discrimination rests on ambiguous testimony as to an alleged statement in 1969 by then Mayor Tate with regard to the 1969 School Board, not the 1971 Panel; the unawareness of certain organizations on the part of a city official who did not have final authority over or responsibility for the challenged appointments; and racial-composition percentage comparisons that we think were correctly rejected by the District Court as meaningless. In our view, this type of proof is too fragmentary and speculative to support a serious charge in a judicial proceeding.[20]

III

The Court of Appeals prefaced its discussion of appropriate relief by noting that it would be "the district court's function to determine the precise nature

[20] We share the view expressed in the dissent that facts in a case like the instant one, "when seen through the eyes of judges familiar with the context in which they occurred, may have special significance that is lost on those with only the printed page before them." *Post*, at 644. That is one reason why we believe that the Court of Appeals, "with only the printed page before [it] . . . ," erred in reversing the District Court. The judge most "familiar with the context in which [the facts] occurred . . ." was obviously the District Judge, since he heard and viewed the testimony and other evidence presented. Nothing in our opinion should be seen as detracting from the salutary principle that great weight should be accorded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances. *E. g., White* v. *Regester*, 412 U. S. 755, 769–770 (1973).

of the relief to which [respondents] are entitled." 472 F. 2d, at 618. Nevertheless, the court held, in part, that the District Court "should enjoin the present Mayor from discriminating in regard to the 1973 or future Panels and should require that before the 1973 Panel is selected, the Mayor or his staff submit to the court evidence that organizations in the black community . . . have received proper consideration." *Id.*, at 619. (Footnote omitted.)

Mayor Tate was succeeded by Mayor Rizzo on January 3, 1972. The Court of Appeals issued its opinion on January 11, 1973. Accordingly, the injunctive orders mandated by the court with regard to the 1973 and future Panels would have run against Mayor Rizzo, not Mayor Tate. As its sole reason for directing such relief against Mayor Rizzo, the Court of Appeals noted that Mr. Zecca continued as Deputy Mayor under the Rizzo administration. *Id.*, at 619 n. 21. But petitioner alleges, and respondents do not deny, that under Mayor Rizzo's stewardship, Mr. Zecca no longer has any responsibility with regard to Panel appointments. Moreover, the entire case has been focused on the appointments made by Mayor Tate. Nothing in the record speaks to the appointment policies of Mayor Rizzo with regard to the Panel. Thus, the record does not support the premise that Mayor Rizzo's appointment record for the Panel will track that of his predecessor.

Where there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor. *E. g., Spomer* v. *Littleton*, 414 U. S. 514 (1974). The Court of Appeals did not have the benefit of such findings at the time it instructed

the District Court to enter injunctive relief against Mayor Rizzo with regard to future Panels. The Court of Appeals therefore erred in its decision on remedies, as well as in concluding that respondents had established a violation of the Fourteenth Amendment.

IV

We turn, finally, to the dissent's argument that this case should be remanded to the District Court for resolution of state law issues under the court's pendent jurisdiction or, in the alternative, for abstention so that the case may be tried from scratch in state court. This approach ignores what the parties have briefed and argued before us, espouses on behalf of respondents state law claims of barely colorable relevance to the instant suit, and would produce a result inconsistent with a commonsense application of the pendent jurisdiction and abstention doctrines.

As the dissent concedes, *post*, at 642, its state law arguments were neither raised in the petition, argued in the briefs, nor articulated in oral argument before this Court. To address them would require us to disregard the admonition of Supreme Court Rule 23.1 (c) that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." See also, *e. g.*, *Mazer* v. *Stein*, 347 U. S. 201, 206 n. 5 (1954); *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 357 n. 2 (1940); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177–178 (1938). Moreover, the assertion that pendent jurisdiction is appropriate and that pendent state claims should be decided first presumes that the state claims have color and make it possible for the case to be "decided without reference to questions arising under the Federal Constitution . . . ." *Siler* v. *Louisville & Nashville R. Co.*,

213 U. S. 175, 193 (1909). That is not true here. In their complaint, respondents set out the following four points of state law and no others: that the 1971 Panel was convened on May 28, whereas the Charter required May 25; that the Mayor appointed the chairman of the Panel, although the Charter allegedly restricts that appointment responsibility to the Panel itself; that one of the Mayor's appointees was not the highest ranking officer of the organization he represented; and that the Mayor appointed certain city officials to the Panel, in alleged contravention of the Charter. A decision for respondents on all of these issues would not have approached resolving the case nor would it have provided a basis for granting the relief to which respondents laid claim. These state law claims were wholly tangential to the principal theme of respondents' lawsuit—an alleged violation of the Equal Protection Clause of the Fourteenth Amendment. It is hardly surprising that respondents have not pursued these claims at either stage of appellate review. In fact, respondents scarcely addressed them in the District Court.

At the opening of the evidentiary hearings, the District Court asked counsel for respondents to describe the basis of the suit. Counsel responded that "the single issue in the case, as we have presented it, is whether there has been racial discrimination in violation of the Fourteenth Amendment in the composition of the Nominating Panel." Tr., Aug. 25, 1971, p. 4. There could be no clearer statement that a litigant's case turns on federal, rather than state, law. And respondents presented their case, as they had drafted their complaint, essentially as an exposition of federal law. To ignore all of this and to compel the District Court now to decide nondispositive state law questions would require a unique reading of the pendent jurisdiction doctrine.

Despite the language of the complaint, respondents' counsel's characterization of the suit before the District Court, and the almost exclusively federal character of the record, the dissent attributes to respondents an independent state law argument that the charter requires "a balanced racial composition on the Panel *as a whole*. . . ." (Emphasis added.) *Post*, at 638. In our view, this is a misreading of the record. Midway through the hearing, the District Court asked respondents whether they were asserting a claim under the language of the Charter. Respondents' counsel replied in a manner that makes clear that he viewed the Charter as merely supportive of the federal law claim and as a part only of a general "picture" or "image" of racial discrimination, not as an independent requirement of racial balance on the Panel as a whole.[21]

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[21] The relevant interchange was as follows:

"THE COURT. Do I understand you to say that it is your interpretation of the wording of the charter in connection with the makeup of the panel that it should be representative of the community generally? Is that what you are saying?

"MR. WOLF. The language is 'represent adequately the entire community,' and what I want to try to make clear in the course of my presentation is that we are not going around looking for a hook to hang our case on.

"We expect to present to you a picture, and we think that each of these items will fit into the picture, and paint an image of racial discrimination.

"We think that one of the pieces that will be in that picture is the statutory context, which is that this committee, this panel, should represent adequately the entire community. We are not arguing that that means X number of whathaveyou; we are just saying that that is relevant.

"If it weren't there, maybe there would be a stronger argument to be made that you should not expect a large number of Blacks there, but it is supposed to represent adequately the entire community, and that means something. It doesn't mean anything

A reluctance by respondents to assert an independent claim that the Charter requires racial balance on the whole Panel is not surprising if one focuses on the language of the Charter itself. The only conceivably pertinent provision is § 12–206 (c):

> "*In order to represent adequately the entire community*, the four other members of the Educational Nominating Panel shall be appointed by the Mayor from the citizenry at large." (Emphasis added.)

As should be immediately apparent, the emphasized phrase, on which the dissent relies and which it apparently views as a requirement of racial balance, *speaks only to the four at-large seats.* The phrase does not address the nine seats restricted to the head of designated categories of citywide organizations and thus plainly does not address the Panel "as a whole." Thus, assuming the language is capable of carrying the meaning that the dissent would import to it and overlooking the fact that respondents did not set it out as an independent ground in their complaint or elsewhere, the provision is simply incapable of resolving a lawsuit addressed at all 13 seats on the Panel. As the District Court noted, "failing to appoint at-large members to adequately represent the entire community [is] not relevant in determining whether racial discrimination was involved with the appointments [to the Panel] . . . ." 333 F. Supp., at 1207.[22]

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exactly, but it means something. It points you in a direction to suggest that you should find—

"THE COURT. And this is one of the sticks in the bundle that I should weigh.

"MR. WOLF. That's right. You should find some Blacks on there under the statute." Tr., Aug. 25, 1971, pp. 75–76.

[22] The dissent also refers to a statement by the chairman of the commission that drafted the Panel with regard to a "balanced cross section of the entire community . . . ." The statement by the

We also believe that the dissent's view of pendent jurisdiction as something akin to subject matter jurisdiction that may be raised *sua sponte* at any stage and that is capable of aborting prior federal court proceedings is a misreading of the law. "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Mine Workers* v. *Gibbs*, 383 U. S. 715, 726 (1966). See 6 C. Wright & A. Miller, Federal Practice and Procedure 813 (1971). To argue that the doctrine requires us to wipe out three levels of federal court litigation of a federal law issue on the off chance that a peripheral state law claim might have merit ignores the Court's recognition that the doctrine's "justification lies in considerations of judicial economy, convenience and fairness to litigants . . . ." *Gibbs, supra*, at 726.[23]

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chairman relied on by the dissent was coupled with the thought that one of the commission's principal purposes was to preserve the Mayor's accountability at the polls for his appointments. The commission apparently believed that the appropriate check on the Mayor's actions was the court of public opinion. Moreover, it is instructive to quote the chairman's statement. After noting that the Panel should serve as a substitute for public election of the School Board, the chairman said:

"It follows that the panel's composition should be so arranged in the charter that it can always constitute a balanced representation or cross-section of the people of the entire community—all of the community's ethnic, racial, economic, or geographic elements and segments."

To convert that statement, as would the dissent, into nothing more than a mandate for racial balance between Negroes and whites is to disregard wholly what the chairman actually said.

[23] Assuming, *arguendo*, that there is substance to the state claims perceived by the dissent, there would still be serious question about the appropriateness of pendent jurisdiction. The dissent concedes that "the sufficiency of the evidence to support [respondents' federal case] is arguable . . . ." *Post*, at 644. The dissent is, therefore, urging avoidance by a district court of a federal claim in favor of

The dissent suggests in the alternative that the District Court be directed to abstain while the parties start this case all over again in state courts. This proposal comes nearly three years after the filing of the complaint and would produce delay attributable to abstention that the Court in recent years has sought to minimize. See, *e. g., England* v. *Medical Examiners,* 375 U. S. 411, 425–426 (1964) (DOUGLAS, J., concurring). And abstention would be pointless since the state issues put forward by the dissent are plainly insufficient to merit such treatment. Moreover, the dissent's theme of the "paramount concern of avoiding constitutional questions, where possible . . ." strikes a particularly jarring note in a civil rights case in which the plaintiffs asserted that "the single issue . . . is whether there has been racial discrimination in violation of the Fourteenth Amendment . . . ." Although we have no occasion to decide the issue here, there is substantial authority for the proposition that abstention is not favored in an equal protection, civil rights case brought as was this one under 42 U. S. C. § 1983 and 28 U. S. C. § 1343.[24]

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state law matters in a case where the federal issue is dubious yet is the only basis for federal jurisdiction. This amounts to an argument that the state tail should wag the federal dog, *e. g.,* H. Hart & H. Wechsler, The Federal Courts and the Federal System 925 (2d ed. 1973), and we do not view it as an efficacious application of the pendent jurisdiction doctrine. *Alma Motor Co.* v. *Timken Co.,* 329 U. S. 129 (1946), on which the dissent relies in concluding that this case should be remanded for resolution of state issues, was a case in which the alternative ground for decision was a *federal* statute over which a district court would have jurisdiction without regard to the presence of federal constitutional issues. It plainly is not in point here. In the instant case, the alternative ground championed by the dissent is not by itself capable of conferring federal jurisdiction.

[24] See, *e. g., McNeese* v. *Board of Education,* 373 U. S. 668 (1963); *Harrison* v. *NAACP,* 360 U. S. 167, 180 (1959) (DOUGLAS, J., joined

We are in general accord, of course, with the dissent's view of the importance of the constitutional decision-avoidance principles articulated by Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 345–348 (1936). But those standards are susceptible of misuse.[25] And we think that to commence relitigation of this case on an insubstantial state issue abandoned by the parties would be a serious abuse of the *Ashwander* standards. There simply is not "present some other ground upon which the case may be disposed of." *Id.*, at 347.

The judgment is reversed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

Philadelphia Home Rule Charter

ARTICLE XII
PUBLIC EDUCATION

CHAPTER 1
THE HOME RULE SCHOOL DISTRICT

Section 12–100. The Home Rule School District.

A separate and independent home rule school district is hereby established and created to be known as "The School District of Philadelphia."

Section 12–101. The New District to Take Over All Assets and Assume All Liabilities of the Predecessor School District.

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by Warren, C. J., and BRENNAN, J., dissenting); ALI Study of the Division of Jurisdiction Between State and Federal Courts § 1371 (g), commentary at 297 (1969).

[25] See Gunther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 Col. L. Rev. 1, 16–17 (1964).

The home rule school district shall

(a) succeed directly the now existing school district for all purposes, including, but not limited to, receipt of all grants, gifts, appropriations, subsidies or other payments;

(b) take over from the now existing school district all assets, property, real and personal, tangible and intangible, all easements and all evidences of ownership in part or in whole, and all records, and other evidences pertaining thereto; and

(c) assume all debt and other contractual obligations of the now existing school district, any long term debt to be issued, secured and retired in the manner now provided by law.

CHAPTER 2

THE BOARD OF EDUCATION

Section 12–200. The Board Created; Its Function.

There shall be a Board of Education of the School District of Philadelphia which shall be charged with the administration, management and operation of the home rule school district.

Section 12–201. Members of the Board; Method of Selection.

There shall be nine members of the Board of Education who shall be appointed by the Mayor from lists of names submitted to him by the Educational Nominating Panel....

Section 12–202. Eligibility for Board Membership.

Members of the Board of Education shall be registered voters of the City. No person shall be eligible to be appointed . . . to more than two full six-year terms.

Section 12–203. Terms of Board Members.

The terms of members of the Board of Education shall begin on the first Monday in December and shall be six

years except that (1) of the first members of the Board appointed . . . , three shall be appointed . . . for terms of two years, three for terms of four years, and three for terms of six years . . . .

Section 12–204. Removal of Members of the Board.

Members of the Board of Education may be removed as provided by law.

Section 12–205. Vacancies on the Board.

A vacancy in the office of member of the Board of Education shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died or resigned. If a member of the Board is removed from office, the resulting vacancy shall be filled as provided by law.

Section 12–206. Educational Nominating Panel; Method of Selection.

(a) The Mayor shall appoint an Educational Nominating Panel consisting of thirteen (13) members. Members of the Panel shall be registered voters of the City and shall serve for terms of two years from the dates of their appointment.

(b) Nine members of the Educational Nominating Panel shall be the highest ranking officers of City-wide organizations or institutions which are, respectively:

(1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,

(2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,

(3) a public school parent-teachers association,

(4) a community organization of citizens established for the purpose of improvement of public education,

(5) a federation, council, or other organization of non-partisan neighborhood or community associations,

(6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,

(7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,

(8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and

(9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City.

(c) In order to represent adequately the entire community, the four other members of the Educational Nominating Panel shall be appointed by the Mayor from the citizenry at large.

(d) In the event no organization as described in one of the clauses (1) through (9) of subsection (b) exists within the City, or in the event there is no such organization any one of whose officers is a registered voter of the City, the Mayor shall appoint the highest ranking officer who is a registered voter of the City from another organization or institution which qualifies under another clause of the subsection.

(e) A vacancy in the office of member of the Educational Nominating Panel shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died, resigned, or was removed.

(f) The Educational Nominating Panel shall elect its own officers and adopt rules of procedure.

Section 12-207. The Educational Nominating Panel; Duties and Procedure.

(a) The Mayor shall appoint and convene the Educational Nominating Panel (1) not later than May twenty-fifth of every odd-numbered year, and (2) whenever a vacancy occurs in the membership of the Board of Education.

(b) The Panel shall within forty (40) days submit to the Mayor three names of qualified persons for every place on the Board of Education which is to be filled. If the Mayor wishes an additional list of names, he shall so notify the Panel within twenty (20) days. Thereupon the Panel shall within thirty (30) days send to the Mayor an additional list of three qualified persons for each place to be filled. The Mayor shall within twenty (20) days make an appointment . . . .

. . . . .

(d) The Educational Nominating Panel shall invite business, civic, professional, labor, and other organizations, as well as individuals, situated or resident within the City to submit for consideration by the Panel the names of persons qualified to serve as members of the Board of Education.

(e) Nothing herein provided shall preclude the Panel from recommending and the Mayor from appointing or nominating persons who have previously served on any board of public education other than the Board of Education created by these charter provisions.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, and with whom MR. JUSTICE DOUGLAS joins in Part II, dissenting.

I

Although the majority describes the "gravamen" of the respondents' complaint as grounded on the Equal

Protection Clause of the Fourteenth Amendment, respondents equally contended that the racially discriminatory appointment of members to the Educational Nominating Panel violated "the express provisions and intended purpose of the Educational Supplement" to the Philadelphia Home Rule Charter.[1] The action sought injunctive and declaratory relief under 42 U. S. C. § 1983, and jurisdiction was invoked under 28 U. S. C. § 1343 (3).

The District Court, after trial at which evidence was developed on both the constitutional and state claims, decided the constitutional claim adversely to the respondents. As to the state claim, the court stated:

> "Further, plaintiffs would have us construe Section 12–206 (c) of the Educational Supplement to hold that the phrase 'representative of the community' refers to racial balance. However, the interpretation of this statute would more properly be decided by the State courts, and we take no position thereto."[2] 333 F. Supp. 1202, 1206–1207 (1971).

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[1] This was a "short and plain statement of the claim," and was a general assertion that there had been racially discriminatory appointments in violation of the Charter. As the Court stated in *Conley* v. *Gibson*, 355 U. S. 41, 48 (1957), "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." A fair reading of the complaint shows that this general claim was supported by allegations of racial discrimination in the body of the complaint and that other violations of the Supplement were asserted "[i]n addition" to the allegations of racial discrimination.

[2] As to another subsidiary state law point, the court stated:

"Similarly, while it is clear that the Mayor has not appointed the chief executive officer of the various organizations selected for representation on the Panel as required by the Educational Supplement,

The Court of Appeals reversed on the constitutional ground, noting that "[i]n view of the result reached on plaintiffs' federal claims, the district court declined to exercise pendent jurisdiction over plaintiffs' claim that the Mayor had also violated state law—namely, various provisions of the Educational Supplement—in selecting Panel Members." 472 F. 2d 612, 616 n. 15 (1973).

Although the court did not directly reach the state claim, it thought that the legislative history of the Educational Supplement "serves as the background for the facts of which plaintiffs complain," *id.*, at 615, particularly the evidence that the chairman of the Educational Home Rule Charter Commission, which drafted the Educational Supplement, contemplated that the composition of the Panel would "constitute a balanced representation or cross-section of the people of the entire community—all of the community's ethnic, racial, economic, or geographic element and segments." *Id.*, at 614–615.

There is no question in this case that the District Court had jurisdiction over this § 1983 action under § 1343 (3), since the equal protection claim was clearly substantial. *Hagans* v. *Lavine, ante,* p. 528. It is equally clear that if the pendent claim were a federal statutory one, the constitutional issue should not be reached if the statutory claim was dispositive. *Id.*, at 543. The statement of this principle in *Hagans,* and the cases on which it relied, *California Human Resources Dept.* v. *Java,* 402 U. S. 121, 124 (1971); *Dandridge* v. *Williams,* 397 U. S. 471, 475–476 (1970); *Rosado* v. *Wyman,* 397 U. S. 397, 402 (1970); *King* v. *Smith,* 392 U. S. 309 (1968), are ultimately premised on what has come to be known as the rule of necessity, of avoiding resolution of controversies on constitutional grounds where possible. *Ash-*

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such violations have no bearing on the charges of racial discrimination and should also be decided by the State courts."

wander v. *TVA*, 297 U. S. 288, 341 (1936) (Brandeis, J., concurring). Justice Brandeis stated the rule as follows:

> "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 191; *Light* v. *United States*, 220 U. S. 523, 538." *Id.*, at 347.

In *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909), a state order regulating rates was attacked as unconstitutional, under the Fourteenth Amendment, on due process and equal protection grounds, as well as under Art. IV, § 4. The complaint also challenged the validity of the order under a state statute. The circuit court had invalidated the state regulation on equal protection and due process grounds. This Court began by noting that there was no question of the federal court's jurisdiction by virtue of the federal questions. The Court, however, invalidated the regulation on state grounds, declaring this preferable to an unnecessary determination of federal constitutional questions:

> "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the

order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record." *Id.*, at 193.

This course was taken despite the fact that the Court was without benefit of a construction of the statute by the highest state court of Kentucky. *Id.*, at 194. This method of adjudication "avoids decision of constitutional questions where possible, and it permits one lawsuit, rather than two, to resolve the entire controversy." C. Wright, Federal Courts 63 (2d ed. 1970). See H. Hart & H. Wechsler, The Federal Courts and the Federal System 922 (2d ed. 1973).

The policy of directly proceeding to a local law issue to avoid deciding a constitutional question, ruled upon in *Siler*, and which achieved doctrinal status in *Ashwander*, is "well settled." *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629 (1946). Since the District Court and Court of Appeals passed by the state law claim, and directly proceeded to the federal constitutional issue, I would vacate the judgment of the Court of Appeals and remand to the District Court for assessment of the state law claim.[3]

The basic relief sought by respondents was to bar the 1971 Panel appointed by Mayor Tate from submitting nominees for the Board to the Mayor, and an order directing the Mayor to appoint a Nominating Panel "fairly representative of the racial composition of the school community." This relief would be equally avail-

[3] This case raises entirely separate issues than were posed in *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), where a state claim was pendent to a federal statutory claim. Under such circumstances, the *Ashwander* doctrine is inapplicable, since there is no federal constitutional claim, and once having decided the federal claim, upon which jurisdiction is premised, the court must determine whether it is proper to resolve the pendent state claim as well.

able as a remedy for violations by the Mayor of the Educational Supplement.

If the District Court had proceeded to the state law claim, it might have decided that it was without merit, or even perhaps frivolous, in which case it would, in any event, have been required to answer the constitutional question. Perhaps if this Court believed the state court claim were of a truly insubstantial nature, the suggestion for a remand might appear not to be worth the candle, and productive of unnecessary delay. I do not believe this to be the case, however.

The respondents' view of state law was that the Mayor, here with the assistance of Deputy Mayor Zecca, was required to compile a list of all organizations which qualified under the nine categories set up by the City Charter, and from this group to select the chief executive officer of one of those organizations in each category with the view of achieving a balanced racial composition on the Panel as a whole. This view was supported by the fact that the chairman of the Educational Home Rule Charter Commission, which drafted the Supplement, stated that the composition of the Panel should constitute a balanced cross section of the entire community, on racial, as well as other grounds. Minutes from the meetings of the Charter Commission were relied upon to support this reading of the Charter.

On the other hand, the petitioners read the Charter quite differently. Deputy Mayor Zecca testified that the description of certain categories almost dictated which organization was to have representation on the Nominating Panel. Category one on the Nominating Panel required representation of "a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes." Mr. Toohey, the head of the AFL–CIO

in Philadelphia, was appointed to the position. When Deputy Mayor Zecca was asked whether there was any other organization in Philadelphia which would fit this general category, he replied, "I don't believe there is another organization that would fit that category to the extent that the AFL–CIO Council operates. This is the broadest possible group." Tr., Aug. 25, 1971, p. 206. Zecca was then asked about the second category which provides for "a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry." The Mayor had appointed the Philadelphian who was the chief ranking officer of the Chamber of Commerce and Industry. When asked why that appointment was made, Zecca stated: "Well, the Chamber of Commerce—I think the wording of the Charter makes it almost implicit that it is referring to the Chamber of Commerce, referring to the use of the word 'chamber.' I think that these restraints, the framers of that Home Rule Supplement practically did everything but dictate exactly who they wanted to serve in those nine categories." *Id.*, at 207.

Respondents and petitioners thus squarely joined issue on the intent of the Charter.[4] Respondents thought any

[4] The general claim of discrimination was not abandoned at trial. As the transcript shows, the statutory claim remained "one of the pieces" in the "picture" of racial discrimination. After evidence was taken, respondents continued to press this claim in their post-trial brief, which stated:

"The evidence presented clearly demonstrates that the entire scheme of appointments violated the central principle of the Panel as expressed by the framers of the Supplement. It is clear from the documents introduced by the defendant that the Panel method of selecting School Board members was adopted after great consideration of a number of alternatives. It is equally clear that the Commission intended that the Panel mechanism function as a substitute for or counterpart of popular election; it should therefore

group fitting a given category should be put into a pool for that category, and then a particular group selected for each category with a view to achieving certain balances on the Panel as a whole. Evidently, the city's view was that the most representative group of the Philadelphia community in each category should be picked without regard to balancing the Panel as a whole. The balancing was already achieved through the diversity of types of organizations to be represented on the Panel. Of course, to the extent that any predominantly white group was more representative of the citizens of Philadelphia, as a whole, than any predominantly black group, this might work to minimize the number of blacks appointed to the Panel, assuming the chief executive officer of a group reflects its predominant racial composition. The resolution of this issue is far from clear, and should have been decided by the District Court without proceeding immediately to the constitutional claim.

The majority only comes to grips with the state law claim of racial discrimination in a footnote, stating: "The statement by the chairman relied on by the dissent was coupled with the thought that one of the commission's principal purposes was to preserve the Mayor's accountability at the polls for his appointments. The commission apparently believed that the appropriate check on the Mayor's actions was the court of public

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constitute a balanced representation of the people of the entire community."

The statement of counsel at the opening of the trial obviously did not fully reflect or anticipate the evidence at trial or the issues tendered and accepted by the District Court. That court, rather than deciding the state law issues as part of the constitutional claim, expressly left them for resolution in the state courts. The fact that a state law claim is presented with a constitutional argument does not remove the claim as an alternative ground of decision.

opinion." *Ante*, at 626–627, n. 22. Whether the Charter intended to confine the discretion of the Mayor is a matter of state law not passed upon by the two federal courts which have reviewed this case. I see no need for this Court, which is far away from the controversy at hand, to decide the merits of the state law claim, on the basis of its own reading of the Charter. The state law claim should be left, in the first instance, to the District Court.[5]

As the majority opinion indicates, one of the grounds relied upon by the Court of Appeals in finding racial discrimination in the appointment of the Panel, under the Fourteenth Amendment, was the fact that Zecca was unaware of many black organizations and institutions set out in the city Charter. Wholly aside from whether the "lack of awareness" might support an inference of racial discrimination, the Court of Appeals noted that Zecca thought that only particular organizations could qualify for appointment under various charter provisions. As I read his testimony, all Zecca claimed he had to know was that the Chamber of Commerce and the AFL–CIO were the most representative trade and labor groups in the city, which automatically dictated appointment of their representatives to the Panel. I take it that, under his view of the Charter, it was not necessary to proceed further. If respondents' reading of the Charter requirements were to prevail over that of petitioners', a violation

[5] In arguing that the claim was insubstantial, the majority attacks a straw man. It assumes that the claim could only have been based on § 12–206 (c) of the Charter, which relates to the selection of at-large members of the Panel. But the claim advanced by respondents was that the framers of the Charter intended that the nine organizational seats on the Panel, selected under § 12–206 (b), when combined with the four at-large selections, represent a racial cross section of the community.

of the state law might well give rise to the relief requested.

Of course, the District Court on remand might decide that it should leave to the state courts resolution of the state law issue, and abstain. In such event, the proper course to follow would be to retain jurisdiction over the constitutional issue pending resolution of the state claim in another forum. The decision to abstain is by no means required and whether that course meets the test of "special circumstances," see *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 509 (1972), is far from certain. I raise this possibility only for the purpose of stressing that even if abstention were to be deemed appropriate, a question on which I indicate no view, the District Court should still refrain from deciding the constitutional issue. The paramount concern of avoiding constitutional questions, where possible, persists. The Court has noted that application of the abstention doctrine inevitably gives rise to delay and expense, *England* v. *Medical Examiners*, 375 U. S. 411, 418 (1964), but the policies underlying the *Ashwander* doctrine should prevail even at this late date in the litigation.

The bearing of the *Ashwander* doctrine was not raised by the parties to this litigation, either in the District Court, the Court of Appeals, or in this Court. However, this Court clearly has "the power to notice a 'plain error' though it is not assigned or specified," *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 412 (1947), and this holds true whether the error has or has not been briefed or argued in this Court. *Silber* v. *United States*, 370 U. S. 717 (1962).

In *Alma Motor Co.* v. *Timken Co.*, 329 U. S. 129 (1946), the Court of Appeals had before it not only a constitutional question which it decided, but also a nonconstitutional question, which alone would have disposed

of the appeal. The Court of Appeals ruled on the constitutional question, and it appears that at no time did any party urge that court to rule on the statutory ground. This Court granted certiorari on the constitutional issue and heard argument at the October 1944 Term on the constitutional question. After the case had been set down for further argument in the 1945 Term, the United States, which was an intervenor in the action, pointed out that the case could be decided on statutory grounds, and moved to vacate the judgment of the Court of Appeals and to remand the case to it for determination of the statutory question. The Court adopted the suggestion of the United States, relying on *Siler*, stating:

> "This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable. This is true even though the question is properly presented by the record. If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided." 329 U. S., at 136.

The presence of the nonconstitutional ground had not been raised below, or in this Court until after argument, but the Court observed:

> "We agree that much time has been wasted by the earlier failure of the parties to indicate, or the Circuit Court of Appeals or this Court to see, the course which should have been followed. This, however, is no reason to continue now on the wrong course. The principle of avoiding constitutional questions is one which was conceived out of considerations of

sound judicial administration. It is a traditional policy of our courts." *Id.*, at 142.

II

Since the majority fails to accept my views on the matter of reaching the constitutional question, I feel compelled to express my thoughts on the merits of the claim of racial discrimination.

On the record in evidence before it, the Court of Appeals found that the 1971 Nominating Panel was discriminatorily chosen. Although the sufficiency of the evidence to support that conclusion is arguable, I would not substitute our own view of the facts and overturn the Court of Appeals' judgment in this respect. Negroes constituted 34% of the population, and 60% of the public school students were Negroes. The purpose of the ordinance establishing the Nominating Panel was to stimulate and invite participation by all groups in the community, including Negroes and other minorities. It is, therefore, especially significant, even from this distant vantage point, that despite the evident intent of the ordinance to have municipal authorities seek out city-wide associations and interest groups, the city official most responsible, short of the Mayor, for the composition of the panel confessed ignorance of many of the organizations from which nominations to the Panel might have been made and which might have put forward meritorious suggestions for school board membership. There was also highly probative evidence with respect to the Mayor's statement that he intended to appoint no more Negroes to the School Board. These facts, when seen through the eyes of judges familiar with the context in which they occurred, may have special significance that is lost on those with only the printed page before them. Sometimes a word, a gesture

or an attitude tells a special story to those who are part of the surrounding milieu. This is one of those situations, and I would not purport to reassess the facts and overturn the considered judgment of the Court of Appeals.

The Court complains that the testimony about the Mayor's statement concerning school membership for Negroes was inadmissible hearsay and was thus entitled to no credence. *Ante*, at 618 and n. 19. But nowhere in this record can one find a denial by Mayor Tate that he did not say what the testimony indicated. His declaration that he was not going to appoint any more Negroes to the School Board was a statement of future intention and as such was quite plainly admissible in evidence.

> "[W]henever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.
>
> "The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be." *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285, 295 (1892).

As an eminent commentator has observed:

> "[I]t is now clear that out-of-court statements which tend to prove a plan, design, or intention of the declarant are admissible, subject to the usual limitations as to remoteness in time and apparent sincerity common to all declarations of mental state, to prove that the plan, design, or intention of the

declarant was carried out by the declarant." C. McCormick, Evidence § 295, p. 697 (2d ed. 1972).

More importantly, the statement evidencing the Mayor's attitude toward Negroes and their appointment to the School Board was simply not hearsay. At the time that the challenged statement was assertedly made and when it was later related by the witness who saw the Mayor make it on television,* Mayor Tate was still in office and a party to the lawsuit. The statement was an admission on his part, and as such it was not hearsay. This elementary proposition of evidence law has most recently been recognized by the draftsmen of the Proposed Rules of Evidence for the United States Courts and Magistrates. Rule 801 (d)(2) expressly acknowledges that an admission by a party-opponent is not hearsay if the statement is offered against the party and was actually made by him in either his individual or representative capacity. The Advisory Committee's Note succinctly outlines the reasons justifying the rule:

> "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U. Pa. L. Rev. 484, 564 (1937); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the

* Tr. of Oral Arg. 31.

> rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility."

The District Court, therefore, was in error in refusing to admit the Mayor's statement in evidence, and the Court of Appeals was correct in considering it and giving it the weight it deserved. Its conclusion was that the statement supported an inference that there was racial discrimination in the formation of the Nominating Panel. But this Court now says that the inference is not a strong one and is insufficient, along with the other evidence, to sustain the judgment. It is at precisely this point, however, that I would not profess superior insight as to the meaning of "local" facts and override the judgment of the Court of Appeals with respect to the issue of discrimination.

My disagreement with the Court does not go beyond what I consider its improvident exercise of a factfinding role in this particular case. I do not question the long-established principle that this Court has a special responsibility, if not an affirmative duty, to ensure by independent review of the facts that the Constitution is not frittered away.

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285 (1964).

Similarly,

> "[t]hat the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. . . . If this requires

an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights." *Norris* v. *Alabama*, 294 U. S. 587, 589–590 (1935).

The constitutional obligation of this Court, therefore, is to scrutinize a record in a case raising federal constitutional questions with detachment and circumspection, and always with an eye toward the impact of factual determinations on the federal right asserted.

But this has never been thought to be a license to rummage through a record looking for shreds of evidence that will discredit the judgment under review and suggest a contrary conclusion. Quite assuredly, reasonable men can, will, and often should differ as to questions of fact as well as law. Likewise, the records in many cases coming to this Court contain complicated, interwoven questions of what have been designated as "law and fact." See H. Hart & H. Wechsler, *supra*, at 601–610. "[I]t is almost impossible [, however,] to conceive how this Court might continue to function effectively were we to resolve afresh the underlying factual disputes in all cases containing constitutional issues." *Time, Inc.* v. *Pape*, 401 U. S. 279, 294 (1971) (Harlan, J., dissenting).

In this case, two interrelated "factual" questions are presented: did the Mayor make the statement evidencing his attitude toward appointing Negroes to the School Board and, if so, is the inference strong enough to support the judgment of the Court of Appeals? The District Court apparently assumed the statement was made, but ruled it inadmissible hearsay that the court should not consider. The Court of Appeals, however, accepted the making of the statement and reached the conclusion, based on the statement, that "[i]f the Mayor decided, prior to receiving nominees from the Panel to exclude

black nominees from consideration, an inference may be drawn that the Mayor in similar manner excluded blacks from consideration as members of the 1971 Panel." 472 F. 2d, at 616 n. 9. The Court apparently disagrees with the unanimous Court of Appeals' assessment that the statement was ever made, but surely this is not the type of historical fact that should command this Court's attention, at least absent some unusually extraordinary or complicating factors. As for the second issue—whether the inference was strong enough to support the judgment of racial discrimination—I fail to see how we are better equipped for this determination than our counterparts on the Court of Appeals.

The District Court, having failed to consider the case with the Mayor's statement in evidence, provides no crutch for this Court. If the District Court's assessment of the presence of racial discrimination is deemed a critical factor, the proper course would be to remand the case to the District Court, rather than to reject, on its own motion, the weight given to that testimony by the Court of Appeals. In *United States* v. *Matlock*, *ante*, at 177–178, where we determined that the District Court had erroneously excluded evidence as hearsay, we determined the evidence should be admitted, but remanded the case to the District Court to determine what weight should be given to the evidence. In the present posture of this case the Court is in no position to rely on any view of the relevant and admissible facts other than its own.

I am also unconvinced that we must reverse every ultimate factual conclusion of the courts of appeals whenever we disagree with them or simply because we would not have arrived at the same conclusion had we been deciding the issue in the first instance. Where ample evidence supports the Court of Appeals' judgment and reasonable

men could make different assessments of the facts, there is room for deferring to the Court of Appeals. This is especially true where its judgment rests on "an intensely local appraisal" of the facts "in the light of past and present reality . . . ." *White* v. *Regester*, 412 U. S. 755, 769–770 (1973).

I must dissent.[1]

[1] I do agree with the Court that the remedy against the incumbent Mayor Rizzo was improvident. See *Spomer* v. *Littleton*, 414 U. S. 514 (1974).